CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 **JULY 2, 1997** **NO. 27**

This issue contains:

U.S. Customs Service
T.D. 97–51 Through 97–53
General Notices
U.S. Court of International Trade
Slip Op. 97–74 Through 97–77
Abstracted Decisions:
Classification: C97/60 and C97/61

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

(T.D. 97–51)

CUSTOMS APPROVAL OF SOCOTEC INTERNATIONAL INSPECTION USA CORPORATION AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of Socotec International Inspection USA Corporation as a commercial gauger.

SUMMARY: Socotec International Inspection USA Corporation, of Metairie, Louisiana, has applied to U.S. Customs for approval to gauge vegetable and animal oils under Part 151.13 of the Customs Regulations (19 CFR 151.13) at their Metairie, Louisiana facility. Customs has determined that this office meets all of the requirements for approval as a commercial gauger. Therefore, in accordance with Part 151.13(f) of the Customs Regulations, Socotec International Inspection USA Corporation, Metairie, Louisiana, is approved to gauge the products named above in all Customs ports.

LOCATION: Socotec International Inspection USA Corporation's approved site is located at: 2325 Severn Avenue, Suite #3, Metairie, Louisiana 70001.

EFFECTIVE DATE: April 29, 1997

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Senior Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: June 12, 1997.

GEORGE D. HEAVEY,
Director,
Laboratories and Scientific Services.

[Published in the Federal Register, June 19, 1997 (62 FR 33458)]

(T.D. 97–52)

REVOCATION OF GAUGER APPROVAL AND REVOCATION OF LABORATORY ACCREDITATIONS OF LABORATORY SERVICE INC.'S FACILITIES LOCATED IN NORCO, LOUISIANA AND BAYONNE, NEW JERSEY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of approval and accreditations of a Customs commercial gauger and laboratory.

SUMMARY: Laboratory Service Inc., of Carteret, New Jersey, a Customs approved gauger and accredited laboratory under Section 151.13 of the Customs Regulations (19 CFR 151.13), has sold the assets for its Norco, Louisiana and Bayonne, New Jersey facilities. Accordingly, pursuant to 151.13(f) of the Customs Regulations, we hereby give notice that the Customs commercial gauger approval and laboratory accreditations for these Laboratory Service Inc. facilities, have been revoked without prejudice. The following Laboratory Services Inc. facilities remain Customs approved/accredited sites: Carteret, New Jersey, Philadelphia, Pennsylvania and Perth Amboy, New Jersey.

EFFECTIVE DATE: June 3, 1997

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Senior Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: June 12, 1997.

GEORGE D. HEAVEY,
Director,
Laboratories and Scientific Services.

[Published in the Federal Register, June 19, 1997 (62 FR 33457)]

(T.D. 97–53)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved November 25, 1996 to February 26, 1997, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and approvals under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Port Director to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: June 13, 1997.

WILLIAM G. ROSOFF,
Acting Director,
International Trade Compliance Division.

(A) Company: BP Chemical, Inc.
Articles: Acrylonitrile catalyst a/k/a Asahi-S, Asahi-Si, Asahi-Se, Asahi-Sm and other Asahi-S catalysts
Merchandise: Silica Sol
Factory: Lima, OH
Proposal signed: November 11, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, November 25, 1996
Revokes: Unpublished authorization of October 23, 1996

(B) Company: Canon Business Machines, Inc.
Articles: Finished solid mixture sifted black toner powder
Merchandise: NP6000 solid mixture black toner powder; strontium titanate
Factory: Costa Mesa, CA
Proposal signed: October 10, 1996
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, February 14, 1997

(C) Company: Ciba-Geigy Corp.
Articles: Terbuthylazine
Merchandise: Tertiary butylamine
Factory: St. Gabriel, LA
Proposal signed: October 1, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, November 26, 1996

(D) Company: CONDEA Vista Co.
Articles: Linear alkyl benzenes and mixes thereof
Merchandise: Paraffins, light (C10–12); paraffins, medium (C12–13); paraffins, heavy (C12–14); olefins (C10–12)
Factories: Westlake, LA (Lake Charles); Baltimore, MD
Proposal signed: September 16, 1996
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to PD of Customs: Houston, January 23, 1997
Revokes: T.D. 96–62–I

(E) Company: Devro-Teepak, Inc.
Articles: Finished cellulose sausage casings
Merchandise: Semi-finished sausage casings
Factories: Danville, IL; Atlanta, GA; Riverside & Kansas City, MO; Summerville, SC
Proposal signed: October 18, 1996
Basis of claim: Appearing in
Contract issued by PD of Customs: New York, February 21, 1997
Revokes: T.D. 92–39–Z to cover name change from Teepak, Inc.

(F) Company: The Donna Karan Co.
Articles: Finished garments
Merchandise: Fabric
Factories: At its various agents operating under T.D. 81–181
Proposal signed: October 9, 1996
Basis of claim: Used in
Contract forwarded to PDs of Customs: San Franciso & New York, December 9, 1996

(G) Company: Hoechst Celanese Chemical Group, Ltd. (Partnership)
Articles: N-butyl alcohol (butanol)
Merchandise: Propylene
Factory: Bay City, TX
Proposal signed: September 17, 1996
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative va'ues at the time of separation
Contract forwarded to PD of Customs: Houston, December 6, 1996

(H) Company: Hoechst Celanese Chemical Group, Ltd. (Partnership)
Articles: 2-ethyl hexanol acrylate a/k/a 2-EH acrylate
Merchandise: 2-ethyl hexanol a/k/a 2-EH
Factory: Pampa, TX
Proposal signed: September 3, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Houston, January 6, 1997

(I) Company: Hoechst Celanese Chemical Group, Ltd. (Partnership)
Articles: Vinyl acetate monomer (VAM)
Merchandise: Methanol; ethylene; acetic acid
Factories: Houston & Pasadena, TX
Proposal signed: September 4, 1996
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to PD of Customs: Houston, December 10, 1996

(J) Company: Kerr-McGee Chemical Corp.
Articles: Titanium dioxide pigment
Merchandise: Synthetic rutile
Factory: Hamilton, MS
Proposal signed: June 20, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New Orleans, December 3, 1996

(K) Company: Knoll Pharmaceutical Co.
Articles: Isoptin®/Calan/Verapamil tablets and granulation; Rythmol®/Propafenone tablets and granulation
Merchandise: Verapamil hydrochloride powder; propafenone hydrochloride powder
Factory: Whippany, NJ
Proposal signed: October 8, 1996
Basis of claim: Appearing in
Contract forwarded to PD of Customs: New York, December 24, 1996

(L) Company: Light Sources, Inc.
Articles: Tanning lamps
Merchandise: Barium disilicate; yttrium oxide; strontium aluminate; barium magnesium aluminate; strontium tetraborate; strontium pyrophosphate
Factory: Milford, CT
Proposal signed: June 28, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, December 17, 1996

(M) Company: Lonza Inc.
Articles: Dextromethorphan hydrobromide (DM.HBr)
Merchandise: p-methoxyphenylacetic acid (PMPA)
Factory: Los Angeles, CA
Proposal signed: February 6, 1997
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, February 10, 1997

(N) Company: The Lubrizol Corp.
Articles: Lubricant additives
Merchandise: Lubricating oil additive intermediate 0839.5
Factories: Painesville, OH; Deerpark & Pasadena, TX
Proposal signed: September 18, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Chicago, January 8, 1997

(O) Company: Lucent Technologies, Inc. (successor to AT&T Corp. under 19 U.S.C. 1313(s))
Articles: Optical fiber; fiber optic cable
Merchandise: Tubes; optical fiber preforms; optical fiber
Factory: Norcross, GA
Proposal signed: December 20, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, January 14, 1997

(P) Company: Markel Corp.
Articles: AR500® automatic push pull cable liner
Merchandise: Polytetrafluoroethylene resin (PTFE resin)
Factory: Norristown, PA
Proposal signed: October 15, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Boston, February 25, 1997

(Q) Company: Merck & Co., Inc.
Articles: CRIXIVAN® (indinavir sulfate capsules)
Merchandise: Indinavir sulfate
Factories: West Point, PA; Elkton, VA
Proposal signed: October 22, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, November 25, 1996

(R) Company: Merck & Co., Inc.
Articles: Dorzolamide hydrochloride
Merchandise: Hydroxysulfone
Factory: Rahway, NJ
Proposal signed: September 9, 1996
Basis of claim: Used, less valuable waste
Contract forwarded to PD of Customs: New York, November 25, 1996

(S) Company: Ohmeda Caribe Inc. (successor to Ohmeda Pharmaceutical Manufacturing Inc.'s authorizations of November 13 and 15, 1996, under 19 U.S.C. 1313(s))
Articles: FORANE® (isoflurane, USP); AERRANE® (isoflurane USP); SUPRANE® (cal. grade); SUPRANE® (desflurane, USP)
Merchandise: Trifluoroethanol; chlorodifluoromethane
Factory: Guayama, PR
Proposal signed: December 10, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, January 15, 1997

(T) Company: Rexam Industries Corp.
Articles: Polyethylene laminated photoresist polyester film
Merchandise: Dry film resist polyester base (PET); low density polyethylene (LDPE)
Factories: Matthews, NC; Spartanburg & Lancaster, SC
Proposal signed: December 27, 1995
Basis of claim: Appearing in
Contract forwarded to PD of Customs: Chicago, February 3, 1997

(U) Company: Sandoz Agro, Inc.
Articles: Technical Norflourazone; Zorial; Solicam
Merchandise: Trifluoromethylaniline; Muccochloric acid
Factories: Mt. Holly, NC; Spartanburg, SC (an agent operating under T.D. 81–181)
Proposal signed: June 23, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: Chicago, December 18, 1996

(V) Company: Southwire Co.
Articles: Copper rod; bare copper, single strand (wire) or solid cable; various aluminum conductor steel reinforced (ACSR) wire and cable; insulated wire; various insulated utility power cables; industrial cables; aluminum rod; service entrance style U products (SESUP)(aluminum and copper)
Merchandise: Steel wire; blister copper; commercial copper anode; copper cathode; copper rod
Factories: Carrollton, GA; Flora, IL; Hawesville, KY; Osceola, AK (2); Starkville, MS; West Jordan, UT
Proposal signed: January 19, 1995
Basis of claim: Appearing in
Contract forwarded to PD of Customs, Miami, January 22, 1997

(W) Company: ZENECA Inc.
Articles: Pro-Jet Cyan 1 Liquid
Merchandise: Pro-Jet Fast Cyan 1 R.O. Feed
Factory: New Castle, DE
Proposal signed: November 25, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, December 18, 1996

(X) Company: ZENECA Inc.
Articles: Pro-Jet Cyan 1 liquid
Merchandise: Pro-Jet Cyan 1 presscake (lixiviated)
Factory: New Castle, DE
Proposal signed: May 28, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, November 25, 1996

(Y) Company: ZENECA Inc.
Articles: Pro-Jet Fast Cyan 2 liquid
Merchandise: Pro-Jet Fast Cyan 2 Stage; a/k/a Pro-Jet Fast Cyan 2 stage presscake; a/k/a Pro-Jet Fast Cyan 2 Stage presspaste
Factory: New Castle, DE
Proposal signed: November 21, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, December 18, 1996

(Z) Company: ZENECA Inc.
Articles: Pro-Jet Fast Yellow 1G liquid
Mercandise: Pro-Jet Fast Yellow 1G Stage a/k/a Pro-Jet Fast Yellow 1G presspaste
Factory: New Castle, DE
Proposal signed: November 21, 1996
Basis of claim: Used in
Contract forwarded to PD of Customs: New York, February 26, 1997

APPROVALS UNDER T.D. 84–49

(1) Company: BP Exploration & Oil, Inc.
Articles: Petroleum and petrochemical products
Merchandise: Crude petroleum and petroleum derivatives
Factories: Toledo & Lima, OH; Alliance, LA
Proposal signed: December 6, 1996
Basis of claim: As provided in T.D. 84–49
Contract issued by PD of Customs: Houston, December 6, 1996
Revokes: T.D. 94–21–1 to cover change in factory locations

(2) Company: Texaco Refining and Marketing Inc.
Articles: Petroleum products and petrochemicals
Merchandise: Crude petroleum and petroleum derivatives
Factories: El Dorado, KS; Wilmington, CA; Anacortes, WA
Proposal signed: February 16, 1996
Basis of claim: As provided in T.D. 84–49
Contract forwarded to PDs of Customs: New York & Houston, December 5, 1996
Revokes: T.D. 87–100–1

U.S. Customs Service

General Notices

APPLICATION FOR RECORDATION OF TRADE NAME: "COINCIDENT SEQUENCING"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "COINCIDENT SEQUENCING," used by PrintScan International, Inc., a corporation organized under the laws of the State of New Jersey, located at 1432 Drum Hill Road, Martinsville, New Jersey 08836.

The application states that the trade name is used in connection with a process describing the international method of comparing fingerprints.

The merchandise is manufactured in the United States.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before August 26, 1997.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Gina D'Onofrio, Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229 (202–482–6960).

Dated: June 19, 1997.

KARL WM. MEANS.
Acting Chief,
Intellectual Property Rights Branch,

[Published in the Federal Register, June 27, 1997 (62 FR 34737)]

APPLICATION FOR RECORDATION OF TRADE NAME: "WINFING"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "WINFING," used by PrintScan International, Inc., a corporation organized under the laws of the State of New Jersey, located at 1432 Drum Hill Road, Martinsville, New Jersey 08836.

The application states that the trade name is used in connection with a demonstration and evaluation software. Its main purpose is to give an insight into the internal working mechanism of the PrintScan core library and to demonstrate the performance of the fingerprint analysis procedure.

The merchandise is manufactured in the United States.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before August 26, 1997.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Gina D'Onofrio, Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229 (202–482–6960).

Dated: June 19, 1997.

KARL WM. MEANS.
Acting Chief,
Intellectual Property Rights Branch,

[Published in the Federal Register, June 27, 1997 (62 FR 34737)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 17, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF STACKABLE CD RACKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of stackable compact disc (CD) racks made of wood and steel wire. Notice of the proposed revocation was published on May 14, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 20.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 1, 1997.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 14, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 20, proposing to revoke NY Ruling Letter (NY) 896635, issued on April 12, 1994, which concerned the tariff classification of compact disc (CD) racks made of wood and steel wire. No comments were received in response to the notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 896635 to reflect the proper classification of CD racks as other household articles of iron or steel under

subheading 7323.99.9060, HTSUS. Headquarters ruling 959513, revoking NY 896635, is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10.(c)(1)).

Dated: June 16, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 16, 1997.

CLA–2 RR:TC:MM 959513 HMC
Category: Classification
Tariff No. 7323.99.9060

MS. MONA WEBSTER
TARGET STORES
33 South Sixth Street
P.O. Box 1392
Minneapolis, MN 55440–1392

Re: Stackable CD Racks; Headings 7323, 7326 and 4420; subheadings 7323.99.9060 and 7326.20.0050; wooden articles or furniture not falling within Chapter 94; table, kitchen or other household articles of iron or steel; other articles of iron or steel, NY 896635, revoked.

DEAR MS. WEBSTER:

This is in response to your letter, dated June 28, 1996, on behalf of Target Stores, requesting reconsideration of NY 896635, dated April 12, 1994. In NY Ruling Letter 896635, Customs classified stackable compact disc (CD) racks, items 128–258 and 128–259, under subheading 7326.20.0050 of the Harmonized Tariff Schedule of the United States (HTSUS), as articles of iron or steel. Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–102, 107 Stat. 2057 (1993), notice of the proposed revocation of NY 896635 was published on May 14, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 20.

Facts:

The two models of CD racks are made of steel wire and wood sides that together are capable of holding 25 single, or 21 single and two double CDs. They measure approximately 16 inches long by 6.5 inches wide by 5.5 inches high. The CD racks are identical in all respects, but for the finish on the wooden side panels. The wooden sides have a black finish (item number 128–258) or a natural finish (item number 129–259). The CDs will be placed between and supported by the steel wires. Although they are sold individually, the CD racks are designed to be stacked one upon the other. The CD racks are packaged and sold in a box displaying a CD rack on a shelf of a wall unit along with books, a candle, and what appears to be a stereo or video component.

The provisions under consideration are as follows:

4420	Wood marquetry and inlaid wood; caskets and cases for jewelry or cutlery and similar articles, of wood; wooden articles or furniture not falling within chapter 94	4%

* * * * * * *

7323	Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel;	
7323.91	Other: Of cast iron, not enameled:	
7323.99	Other: Coated or plated with precious metal: Not coated or plated with precious metal: Other:	
7323.99.9060	Other	3.4%
*	* * * * * *	
7326	Other articles of iron or steel: Forged or stamped but not further worked:	
7326.20.0050	Articles of iron or steel wire Other	4.6%

Issue:

Whether the CD racks are classifiable as household articles of iron or steel under heading 7323, HTSUS, as other articles of iron or steel under heading 7326, HTSUS, or as wooden articles under heading 4420, HTSUS.

Law and Analysis:

Merchandise is classifiable under the HTSUS, in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The CD racks are made of steel wire and wooden sides that together are capable of holding single or double CDs. The articles are described under heading 4420, HTSUS, as "* * *wooden articles or furniture not falling within chapter 94," heading 7323, HTSUS, as "* * * other household articles of iron or steel" and heading 7326, HTSUS, as "other articles of iron and steel."

GRI 2(b) states that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

GRI 3(a) states that when, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. The CD racks are made up of two different components which together form an inseparable whole. Since the CD racks are composite goods, described in part by two or more headings, we must apply rule 3(b) which requires that composite goods are to be classified according to the component which gives the good its essential character.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized system. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the notes should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35126 (Aug. 23, 1989).

Explanatory Note (VIII) to GRI 3(b), at page 4, states that the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use at the goods.

We believe the steel component imparts the essential character to the CD racks. The steel component is the most visually and structurally significant part of the article. It provides the main function of holding the CDs and without it there could not be a rack. The

wooden sides simply assist in this function, by providing support to the steel part and acting as a base to the article. In accordance with GRIs 3(b), the CD racks are properly classified according to the constituent component of steel. Articles of steel are provided in Chapter 73, HTSUS. It was suggested that the merchandise is appropriately classified under subheading 7323.99.9060, HTSUS, based on the premise that the articles are intended to be used in the home to hold compact discs.

EN 73.23, at page 1123, indicates that heading 7323, HTSUS, comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for table, kitchen or other household purposes. The EN further provides that this group includes **other household articles** such as wash coppers and boilers; dustbins, buckets, coal scuttles and hods; watering-cans; ash-trays; hot water bottles; bottle baskets; movable boot-scrapers; stands for flat irons; baskets for laundry, fruit, vegetables, etc.; letter-boxes; clothes-hangers, shoe trees; luncheon boxes. Accordingly, we must determine whether the CD racks are household articles.

The U.S. Court of International Trade (CIT) has noted *Webster's New World Dictionary of American English* 654 (3d College ed. 1988)'s definition of the term "household" as "of a household or home; domestic." The Court determined that when "household" is used with the term "articles" a use provision is created. *Hartz Mountain Corp. v. United States*, 903 F.Supp. 57, 59, CIT Slip Op. 95–154 (Sept. 1, 1995). The Court found the phrase "household articles" to be a use provision within the context of subheading 3924.90.50, HTSUS. Similarly, we believe that, within the context of heading 7323, HTSUS, when "household" is used with the term "articles" a use provision is created.

Additional U.S. Rule of Interpretation 1(a), HTSUS, states that in the absence of special language or context which otherwise requires, a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. The subject articles will thus fall under heading 7323 if they belong to the class or kind of articles principally used in the home. The Court has established various factors, which are indicative but not conclusive, to apply when determining principal use within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. *See Hartz Mountain Corp.*, 903 F.Supp. at 59. In this instance, these factors are helpful in determining whether the CD racks are intended for home use.

The CD racks are made to hold CDs. They are packaged and sold in a box displaying a CD rack on a shelf of a wall unit along with books, a candle, and what appears to be a stereo or video component. They are sold by a retailer directly to the consumer as a merchandise which would organize a collection of CDs. The consumer will generally be expected to store such articles within the home. The evidence presented indicates that the CD racks are principally used in the home and that it would be impracticable to give them a different use. We therefore find that, since the CD racks will be used for household purposes, they are classifiable under subheading 7323.99.9060, HTSUS, as other household articles of iron or steel.

NY 896635 classified the subject merchandise in heading 7326, HTSUS, which provides for "Other articles of iron or steel." EN 73.26 states that this heading covers all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes such as folding, assembling, welding, turning, milling or perforating **other than** articles included in the preceding headings of this Chapter or covered elsewhere in the Nomenclature. Since the CD racks are included in heading 7323, HTSUS, we find that they are precluded from classification under heading 7326, HTSUS. Accordingly, NY 896635 is being revoked.

Holding:

The stackable CD racks, items 128–258 and 128–259 are provided for in heading 7323. They are classifiable under subheading 7323.99.9060, HTSUS, as "table, kitchen or other articles of iron or steel: Other: Other: Not coated or plated with precious metal: Other: Other * * * Other." The rate of duty is 3.4% *ad valorem*.

Effect on Other Rulings:

NY 896635, dated April 12, 1994, is revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF RULING LETTER RELATING TO COUNTRY OF ORIGIN DETERMINATION OF TENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of country of origin ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the country of origin of tents. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before August 1, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue. N.W., (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington D.C.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the country of origin of tents.

In Headquarters Ruling Letter (HQ) 959311, dated June 17, 1996, the country of origin of certain tents composed of materials from two or

more countries was analyzed based on section 102.21(c)(5) of the Customs Regulations (19 CFR 102.21(c)(5)). Section 102.21(c)(5) states that the country of origin is the last country in which an important assembly or manufacturing process occurs. This analysis was based on the assumption that in those scenarios involving two or more countries, all of the materials comprising the tents were fabric. This ruling letter is set forth in "Attachment A". A review of the file for HQ 959311 has revealed that not all of the materials comprising the tent are fabric. In fact, the floor of the tents is made of PE sheet, a plastic. As such one of the four scenarios addressed in HQ 959311 (specifically scenario II) is in error.

At issue in this proposed modification is the proper analysis for scenario II for the subject tents and consequently, the correct country of origin.

Customs intends to modify HQ 959311 to reflect the proper country of origin of the tents. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HQ) 960576 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 16, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 17, 1996.

CLA–2 RR:TC:TE 959311 jb
Category: Classification

JENNIFER MULLIKIN
THE COLEMAN COMPANY, INC.
3600 N. Hydraulic
Wichita, KS 67219

Re: Country of origin determination for tents; 19 CFR § 102.21(c)(2); tariff shift; 19 CFR § 102.21(c)(5); last country in which an important assembly occurs.

DEAR MS. MULLIKIN:

This is in reply to your letter dated June 6, 1996, requesting a country of origin determination for certain tents which will be imported into the United States sometime on or after July 1, 1996.

Facts:

The submitted merchandise consists of a variety of styles of nylon taffeta tents. The manufacturing processes as follows:

SCENARIO I

Country A
—material for roof and walls is formed.

Country B
—material for roof and walls is formed.

Country C
—material for floor is formed.

Country D
—cutting, assembly and packing.

SCENARIO II

Country A
—material for roof and walls is formed.

Country C
—material for floor is formed.

Country D
—cutting, assembly and packing.

SCENARIO III

Category A
—material for roof and walls is formed.

Country C
—fiberglass poles are formed.

Country D
—cutting, assembly and packing.

SCENARIO IV

Country A
—material for roof, walls and floor is formed.

Country D
—cutting, assembly and packing.

Issue:

What is the country of origin of the subject merchandise?

Law and Analysis:

On December 8, 1994, the President signed into law the Uruguay Round Agreements Act. Section 334 of that Act provides new rules of origin for textiles and apparel entered, or withdrawn from warehouse, for consumption, on and after July 1, 1996. On September 5, 1995, Customs published Section 102.21, Customs Regulations, in the Federal Register, implementing Section 334 (60 FR 46188). Thus, effective July 1, 1996, the country of origin of a textile or apparel product shall be determined by sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Paragraph (c)(1) states that "The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced." As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, in any of the four scenarios, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states that "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section:"

Paragraph (e) states that "The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section":

6301–6306	The country of origin of a good classifiable under heading 6301 through 6306 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.

The subject tents are classified in heading 6306, HTSUSA. Of the scenarios you have presented, only in scenarios III and IV is the fabric for the tents formed in a single country. As the fabric-making" process occurs in a single country, country of origin is conferred by Country A in scenarios III and IV.

Paragraph (c)(3) states that "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section":

> (i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or
>
> (ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

As the subject merchandise is not knit, and heading 6306, HTSUSA, is excepted from provision (ii), Section 102.21(c)(3) is inapplicable.

Section 102.21(c)(4) states, "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory or insular possession in which the most important assembly or manufacturing process occurred". It is the belief of this office that in the case of the subject tents, in scenarios I and II, the most important manufacturing process occurs at the time of the fabric making. As the fabric for the tents is formed in more than one country, and no one fabric is more important than the other, country of origin cannot be readily determined based on the fabric making process. As such, paragraph (c)(4) is not applicable.

Paragraph (c)(5) states, "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2), (3) or (4) of this section, the country of origin of the good is the last country, territory or insular possession in which an important assembly or manufacturing process occurred. Accordingly, in the case of scenarios I and II, country of origin is conferred by the last country in which an important assembly occurred, that is, Country D.

Holding:

In scenarios I and II, the country of origin of the subject tents is Country D.

In scenarios III and IV, the country of origin of the subject tents is Country A.

The holding set forth above applies only to the specific factual situation and merchandise identified in the ruling request. This position is clear[y set forth in section 19 CFR 177.9(b)(1). This sections states that a ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect.

Should it be subsequently determined that the information furnished is not complete and does not comply with 19 CFR 177.9(b)(1), the ruling will be subject to modification or revocation. In the event there is a change in the facts previously furnished, this may affect the determination of country of origin. Accordingly, if there is any change in the facts submitted to Customs, it is recommended that a new ruling request be submitted in accordance with 19 CFR 177.2.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA–2 RR:TC:TE 960576 jb
Category: Classification

JENNIFER MULLIKIN
THE COLEMAN COMPANY, INC.
3600 N. Hydraulic
Wichita, KS 67219

Re: Modification of HQ 959311, dated June 17, 1996; country of origin of tents; floor made of PE sheet; 102.21(c)(2); tariff shift.

DEAR MS. MULLIKIN:

On June 17, 1996, this office issued to you Headquarters Ruling Letter 959311 regarding the country of origin of certain nylon taffeta tents covering four manufacturing scenarios. A review of the file has revealed that contrary to what is stated in the ruling, the floor for the subject tents is made out of PE sheet and not a fabric. Although this change in the facts does not affect all of the country of origin determinations set out in that ruling, scenario II is incorrect. Accordingly, this letter win set out the proper analysis and country of origin determination for that affected scenario.

Facts:

The manufacturing operations discussed in HQ 959311 are as follows:

SCENARIO I

Country A
—material for roof and walls is formed.
Country B
—material for roof and walls is formed.
Country C
—material for floor is formed.
Country D
—cutting, assembly and packing.

SCENARIO II

Country A
—material for roof and walls is formed.
Country C
—material for floor is formed.
Country D
—cutting, assembly and packing.

SCENARIO III

Country A

—material for roof and walls is formed.

Country C

—fiberglass poles are formed.

Country D

—cutting, assembly and packing.

SCENARIO IV

Country A

—material for roof, walls and floor is formed.

Country D

—cutting, assembly and packing.

In scenarios I and II addressed in HQ 959311, as the fabric for the tents' roof, walls and floor was formed in two or more countries, a section 102.21(c)(5) (multi-country) analysis was applied which determined that the county of origin of the tents was the country in which the assembly occurred. In scenarios III and IV as the fabric for the tents was formed in a single country, a section 102.21(c)(2) analysis was applied which determined that the country of origin of the tents was the country in which the fabric making occurred. The determinations in that ruling were premised on the fact that all of the materials which comprised the tents were fabric.

In regard to scenario I the determination is accurate because the fabric is sourced in two countries and the PE sheet in a third country, thus, as per section 102.21(c)(5) the country of origin is Country D, that is, the last country in which an important assembly operation occurred. In scenarios III and IV as all of the fabric and the PE sheet are sourced in Country A, country of origin is conferred in Country A.

Scenario II however, where the manufacturing operation for the tents involves fabric for the roof and walls sourced in Country A and PE sheet for the floor sourced in County C, is incorrect both in the analysis and the determination. This letter serves to rectify scenario II.

Issue:

What is the proper country of origin for the tents in scenario II?

Law and Analysis:

On December 8, 1994, the President signed into law the Uruguay Round Agreements Act. Section 334 of that Act provides new rules of origin for textiles and apparel entered, or withdrawn from warehouse, for consumption, on and after July 1, 1996. On September 5, 1995, Customs published Section 102.21, Customs Regulations, in the Federal Register, implementing Section 334 (60 FR 46188). Thus, effective July 1, 1996, the country of origin of a textile or apparel product shall be determined by sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Paragraph (c)(1) states that "The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced." As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states that "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which the foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section."

Paragraph (e) states that "The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:"

6301–6306	The country of origin of a good classifiable under heading 6301 through 6306 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.

The subject tents are classified in heading 6306, HTSUSA. The tents in scenario II are made of both a fabric and a non-fabric material. As the fabric is formed in a single country, as per the terms of the tariff shift, the country of origin of the tents in scenario II is the country in which the fabric making process occurred, that is, Country A.

Holding:

Accordingly, HQ 959311, date June 17, 1996, is modified to reflect Country A as the country of origin for the tents in scenario II.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF LIGHTED ARTIFICIAL PINE GARLAND

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of lighted artificial pine garlands. These articles consist of artificial pine foliage and a strand of 258 plastic tips and 50 clear lights with plug-in connector cord. Customs invited comments on the correctness of the proposed modification.

DATE: Comments must be received on or before August 1, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Submitted comments may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of lighted artificial pine garlands. Customs invites comments on the correctness of the proposed modification.

In *NY* 814073, dated September 20, 1995, a Lighted Glacier Wreath and a Lighted Glacier Pine Garland were held to be classifiable as articles for Christmas festivities, of plastics, in subheading 9505.10.40, Harmonized Tariff Schedule of the United States (HTSUS). These were articles consisting of polyvinyl chloride (pvc) pine branches or foliage and an electrical wiring harness incorporating multiple light sockets and bulbs with plug-in connector cord. *NY* 814073 is set forth as "Attachment A" to this document.

It is now Customs position that the garland is precluded from classification in subheading 9505.10.40 by virtue of chapter 95, Note 1(t), HTSUS, which excludes electric garlands of all kinds, These are referred to heading 9405 as lamps and lighting fittings.

Customs intends to modify *NY* 814073 to reflect the proper classification of the Lighted Glacier Pine Garland under subheading 9405.30.00, HTSUS, as lighting sets of a kind used for Christmas trees. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 960590 modifying *NY* 814073 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 13, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 20, 1995.

CLA–2–95:S:N:N3:343 814073
Category: Classification
Tariff No. 9505.10.4020

MS. DEBRA TUFT
SEASONAL SPECIALTIES
11455 Valley View Road
Eden Prairie, MN 55344

Re: The tariff classification of an artificial wreath and garland for Christmas festivities, from either Hong Kong or China.

DEAR MS. TUFT:

In your letter dated August 2, 1995, you requested a tariff classification ruling.

Two representative samples were submitted. The first item, identified as 08890720133—24" Lighted Glacier Wreath, consists of a wreath composed of artificial pine branches. The wreath is stated to contain 87 plastic tips and contains 50 clear lights with a connector cord.

The second item, identified as 08890720120—9' Lighted Glacier Pine Garland, consists of an garland which is also composed of artificial pine foliage. The garland is stated to contain 258 plastic tips and 50 clear lights having a connector cord. Both of these items have been considered traditionally associated with Christmas festivities.

While your letter is somewhat ambiguous about the country of origin of this merchandise, the applicable subheading for the two products will be 9505.10.4020, Harmonized Tariff Schedule of the United States (HTS), which provides for festive articles * * * for Christmas festivities * * *, nativity scenes and figures thereof, of plastics, other than artificial Christmas trees. The rate of duty will be Free whether produced in Hong Kong or China.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Theodore Rauch at 212–466–5892.

ROGER C. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM 960590 JAS
Category: Classification
Tariff No. 9405.30.00

MS. DEBRA TUFT
SEASONAL SPECIALTIES
11455 Valley View Road
Eden Prairie, MN 55344

Re: *NY* 814073 Modified; glacier pine garland; article with artificial pine foliage and lights with connector cord; lighting fittings, lighting sets of a kind used for Christmas trees; articles for Christmas festivities of plastics, subheading 9505.10.40; Chapter 95, Note 1(t); *HQ* 952890, *HQ* 958221; GRI 3(b), essential character, GRI 6.

DEAR MS. TUFT:

In *NY* 814073, dated September 20, 1995, the Director, National Commodity Specialist Division, New York Seaport, responded to your letter of August 2, 1995, and confirmed that lighted artificial pine wreaths and garlands were classified as other articles for Christmas festivities, of plastics, in subheading 9505.10.40, Harmonized Tariff Schedule of the United States (HTSUS). This ruling is incorrect with respect to the pine garland and no longer represents the position of the Customs Service with respect to this article.

Facts:

The articles in *NY* 814073 were the 24" Lighted Glacier Wreath, item 08890720133, and the 9′ Lighted Glacier Pine Garland, item 08890720120. The wreath was said to consist of artificial polyvinyl chloride or pvc pine branches and 87 plastic tips and 50 clear lights with a connector cord. Your ruling request stated the cost of materials to be $4.75. The garland was said to consist of artificial pvc pine foliage and 258 plastic tips and 50 clear lights with connector cord. The cost of the materials was stated to be $7.97. The ruling did not further describe these articles.

The provisions under consideration are as follows:

9405	Lamps and lighting fittings * * * not elsewhere specified or included * * *:
9405.30.00	Lighting sets of a kind used or Christmas trees * * * 8 percent *ad valorem*
9405.40	Other electric lamps or lighting fittings:
	Of base metal:
9405.40.60	Other * * * 6.6 percent *ad valorem*
9405.40.80	Other * * * 3.9 percent *ad valorem*

Issue:

Whether the Lighted Glacier Pine Garland is a lighting set of a kind used for Christmas trees; whether it is other electric lamps and lighting fittings.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 6 states in part that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable. For the purposes of Rule 6, the relative section, chapter and subchapter notes also apply, unless the context requires otherwise.

Festive, carnival or other entertainment articles, to include garlands, are provided for in heading 9505. However, Chapter 95, Note 1(t), HTSUS, excludes electric garlands of all kinds. For this reason, the Lighted Glacier Pine Garland described in *NY* 814073 is not provided for in heading 9505. Note refers such articles to heading 9405.

The Lighted Glacier Pine Garland is not classifiable by GRI 1 as no heading describes it, nor is it classifiable under GRI 2. Under GRI 3, the garland is *prima facie* classifiable under three headings, each of which describes part only of the materials that comprise it: heading 3926, articles of plastic, which describes the pvc constituent material of the garland, heading 9405, lamps and lighting fittings, which describes the strand of lights, and heading 9505, festive articles, which describes the garland. Under Rule 3(a) these headings are deemed equally specific. Under Rule 3(b), the Lighted Glacier Pine Garland is a composite good consisting of different materials or made up of different components. It is to be classified as if consisting only of the material or component which gives it its essential character, insofar as this criterion is applicable. A component or material's bulk, quantity, weight, value or role in relation to the use of the entire article are among relevant factors Customs considers in making essential character determinations. In this case, it is our opinion that the strand of lights—50 light sockets with clear bulbs attached to a wire harness with plug-in cord—imparts the essential character to the garland. The lights clearly predominate by value and, in addition, identify the article as a *lighted* artificial pine garland and allow it to function as such. The Lighted Glacier Pine Garland is to be classified as if consisting only of the light strand which is provided for in heading 9405. *See HQ* 952990, dated March 16, 1993, in which outdoor electric light sculptures were classified using similar methodology.

The question, then, is whether the light strand is classifiable in subheading 9405.30.00, in subheading 9405.40.60, or in subheading 9405.40.80. GRI 6 permits us to compare these same-level subheadings using GRIs 1 through 5. Under GRI 3(a), applied at the subheading level through GRI 6, we conclude that subheading 9405.30.00, lighting sets of a kind used for Christmas trees, provides the most specific description for the light strand. Our information is that Christmas tree lighting sets are not limited to the traditional seasonal colors red, green, orange and blue. Moreover, they are not limited by length, rather by the number of bulbs, typically 25, 50, or 100 per strand, but such sets may include as few as 10 bulbs. *HQ* 958221, dated August 7, 1995, classified a lighted Canadian pine garland nearly identical to the Lighted Artificial Pine Garland in issue here in subheading 9405.30.00, HTSUS.

Holding:

The Lighted Glacier Pine Garland, item 08890720120, is provided for in heading 9405. Under the authority of GRI 3(a), applied at the subheading level through GRI 6, it is classifiable in subheading 9405.30.00, HTSUS. *NY* 814073, dated September 20, 1995, is modified accordingly.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF TOY HATS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of toy hats. Comments are invited with respect to the correctness of the proposed ruling.

DATE: Comments must be received on or before August 1, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff classification Appeals Division, 1301 Constitution Avenue, NW. (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Office of Regulations and Rulings, Textile Branch, (202) 482–6976.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act or 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the classification of toy hats. Comments are invited with respect to the correctness of the proposed ruling.

In New York Ruling Letter (NYRL) 807280, dated February 25, 1995, Customs classified an article described as a "Minnie Mouse Ear Hat" in subheading 6506.91.0060, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Other headgear, whether or not lined or trimmed: Other: Of rubber or plastics, Other." NYRL 807280 is set forth as Attachment "A" to this document.

It is Customs position that, since the article is non-durable, decorative, and principally designed for amusement, it is similar to articles of chapter 95, more specifically, heading 9505, HTSUS. The item should be classified in subheading 9505.90.6020, HTSUSA, the provision for "Festive, carnival or other entertainment articles * * *: Other: Other,

Hats: Other." The proposed ruling modifying NYRL 807280 ts set forth as Attachment "B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 11, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 25, 1995.

CLA–2–65:S:N:N5:353 803895
Category: Classification
Tariff No. 6506.91.0060

MR. STEVEN H. BECKER
MS. KAREN BYSIEWICZ
COUDERT BROTHERS
114 Avenue of the Americas
New York, NY 10036–7794

Re: The tariff classification of a Minnie Mouse Ear Hat from China.

DEAR MR. BECKER AND MS. BYSIEWICZ:

In your letter dated November 4, 1994, received in our office on November 7, 1994, you requested a tariff classification ruling on behalf of your client Canasa Trading Corporation (West). A sample of the hat at issue was submitted for examination and will be returned as per your request. *This ruling amends ruling NY 803895.*

The submitted sample consists of a beanie-type hat of red felt material stated to be made up from 52% wool and 48% rayon onto which two black plastic ears have been affixed near the crown of the hat to simulate the appearance of the ears of the Walt Disney character, Minnie Mouse. The. beanie is also trimmed with black plastic binding along the bottom edge of the hat. Although the submitted sample of the hat consists of red felt, you note that the hats are usually made of black felt. The hat also sports a red and white polka-dotted ribbon that is tied in the form of a bow and attached to the crown of the hat at a point between the ears. The imported hat will also contain a heat transfer label affixed to the beanie in the center front which would typically bear the name of the hat's wearer or the Mickey Mouse Club Logo. **While the submitted sample was a Minnie Mouse Hat, this ruling also applies to a Mickey Mouse Hat which is configured without a textile decorative ribbon.**

The article at issue is made up of composite goods and there are both textile and plastic components to the ear hat. Pursuant to GRI 2, goods comprised of more than one material, or which are *prima facie* classifiable under two provisions in the nomenclature (6506 vs. 6506), are to be classified according to GRI 3. GRI 3(b) provides that:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale shall be classified as if they consisted of the material or component which gives them their essential character.

Explanatory Note VIII to GRI 3 (b) states that:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or compo-

nent, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The article at issue has substantial plastic components which form an integral part of the ear hat. The plastic disks, made of black plastic, have the shape of the ears or the Walt Disney character, Minnie Mouse. The presence of these disks or ears, define the hat as an "ear hat". The plastic ears affixed to the textile beanie transform this article into Minnie Mouse memorabilia and offer its principle appeal. You state that the ear hats are sold primarily in Walt Disney Theme Parks, such as Disneyland and Disneyworld and that young visitors typically wear the ear hats during their stay at the Disney attraction parks and take the hats home as a souvenir of their visit. The ear hat constitute a more distinctive and unusual type of headgear.

Moreover, you state that the cost of the plastic components per 1000 hats is $85, while the cost of the textile components per 1000 hats is $92 which indicates that the plastic components contributes substantial value to the goods. Also, the plastic ears are placed prominently on the beanie and securely affixed thereto by metal grommets so that their removal would damage the remainder of the ear hat.

Based on the foregoing, it is our opinion that the essential character of the article at issue is imparted by the plastic components which form the ears of the hat.

The applicable subheading for the Minnie Mouse Ear Hat will be 6506.91.0060, Harmonized Tariff Schedule of the United States (HTS), which provides for Other headgear, whether or not lined or trimmed: other, of rubber or plastics * * * other. The rate of duty will be 2.4 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 958650 GGD
Category: Classification
Tariff No. 9505.90.6020

MR. STEVEN H. BECKER
MS. KAREN BYSIEWICZ
COUDERT BROTHERS
114 Avenue of the Americas
New York, NY 10036–7794

Re: Revocation of New York Ruling Letter (NY) 807260; "Minnie Mouse Ear Hat;" toy hat; not other textile headgear.

DEAR MR. BECKER AND MS. BYSIEWICZ:

In NY 807280, issued February 25, 1995, an article described as a "Minnie Mouse Ear Hat" was classified in subheading 6506.91.0060, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "other headgear, whether or not lined or trimmed: Other: Of rubber or plastics, Other." We have reviewed that ruling and have found it to be partially in error. Therefore, this ruling revokes NYRL 807280.

Facts:

At the tine NY 807280 was issued, the sample was described as consisting of a beanie-type hat of felt material onto which a polka-dotted ribbon and two black plastic ears were

affixed, simulating the appearance of the Walt Disney character, Minnie Mouse. The ruling also applied to a "Mickey Mouse Hat," which had no ribbon but was otherwise similarly configured.

Issue:

Whether the "Minnie Mouse Ear Hat" is classified in heading 6506, HTSUS, as other headgear, or in heading 9505, HTSUS, as a toy hat.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Chapter 65, HTSUS, covers headgear and parts thereof. Note 1(c) to chapter 65 states that "This chapter does not cover: Dolls' hats, other toy hats or carnival articles of chapter 95."

Heading 6506, HTSUS, applies to "Other headgear, whether or not lined or trimmed." The EN to heading 6506 indicate that the heading covers all hats and headgear not classified in the preceding headings of the chapter, or in chapters 63, 68, or 95. The EN suggest that the heading covers, in particular, safety headgear (e.g., for sporting activities, military or firemen's helmets, motor-cyclists', miners' or construction workers' helmets), whether or not fitted with protective padding or, in the case of certain helmets, with microphones or earphones. It thus appears that hats classifiable in heading 6506 are utilitarian, and that at least some types of the headgear covered perform extremely important functions.

Among other goods, chapter 95, HTSUS, covers toys. Although the term "toy" is not specifically defined in the tariff, the EN to chapter 95 indicate that the chapter covers toys of all kinds whether designed for the amusement of children or adults. It has been Customs position that the "amusement" requirement means that a toy should be designed and used principally for amusement and should not serve a utilitarian purpose.

Among other items, heading 9505, HTSUS, provides for festive, carnival or other entertainment articles. The EN to heading 9505 state, in part, that the heading covers:

> (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include:
>
> (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc. * * *
>
> (3) Articles of fancy dress, e.g., masks, false ears and noses, wigs * * * and paper hats. However, the heading excludes fancy dress of textile materials, of Chapter 61 or 62.

The "Minnie Mouse Ear Hat" is not similar to the types of functional headgear cited as examples in the EN to heading 6506, HTSUS. The hat is non-durable and, if functional at all, its decorative nature clearly predominates over any utilitarian purpose. It is thus similar to the types of articles cited in the EN to heading 9505 (e.g., false ears, paper hats, etc.). We find that the article is principally designed for amusement and is, therefore, a toy hat excluded from chapter 65, HTSUS. The "Minnie Mouse Ear Hat" is classified in subheading 9505.90.6020, HTSUSA.

Holding:

The article identified as a "Minnie Mouse Ear Hat" is classified in subheading 9505.90.6020, HTSUSA, the provision for "Festive, carnival or other entertainment articles * * *: Other: Other, Hats: Other." The applicable duty rate is free.

NYRL 807280, issued February 25, 1995, is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–74)

NSK LTD., NSK CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., NTN DRIVESHAFT, INC., AND NTN-BOWER CORP., PLAINTIFFS AND DEFENDANT-INTERVENORS, NIPPON PILLOW BLOCK SALES CO., LTD. AND FYH BEARING UNITS USA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF, AND HONDA MOTOR CO., LTD., AMERICAN HONDA MOTOR CO., INC., HONDA OF AMERICA MFG., INC., AND HONDA POWER EQUIPMENT MFG., INC., DEFENDANT-INTERVENORS

Consolidated Court No. 95–03–00239

Plaintiffs and defendant-intervenors, NSK Ltd. and NSK Corporation (collectively "NSK"), Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (Collectively "Koyo"), NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corp., NTN Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation (collectively "NTN"), Nippon Pillow Block Sales Co., Ltd. and FYH Bearing Units USA (collectively "NPB") move this Court for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. Plaintiffs challenge the Department of Commerce, International Trade Administration's ("Commerce") final results of the administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 Fed. Reg. 10,900 (Feb. 28, 1995).

NSK claims Commerce erred in: (1) failing to apply a tax-neutral methodology in computing the value-added tax ("VAT") adjustment; (2) treating NSK's return rebates and post-sale price adjustments as indirect selling expenses; (3) denying NSK a direct adjustment to foreign market value ("FMV") for home market early payment discounts and distributor incentives; (4) rejecting NSK's lump sum post-sale price adjustments and stock transfer commissions as indirect expenses; (5) not using NSK's purchase prices for bearings purchased by NSK from related suppliers; (6) improperly calculating exporter's sales price for imported bearing parts further manufactured in the United States; (7) rejecting NSK's reported interest income offset to interest expense in the calculation of cost of production ("COP") and constructed value ("CV"); and (8) including zero-priced sample sales in the U.S. database.

Koyo contends Commerce erred in: (1) failing to apply a tax-neutral methodology in computing the VAT adjustment; (2) disallowing certain Koyo home market post-sale price adjustments that were not reported on an invoice- or product-specific basis; (3) investigat-

ing the cost of inputs obtained by Koyo from related party suppliers; (4) reclassifying Koyo's non-operating expenses and payments out of retained earnings as production expenses; and (5) committing certain clerical errors.

NTN argues Commerce erred in: (1) failing to apply a tax-neutral methodology in computing the VAT adjustment; (2) including sample sales in the FMV calculation; (3) crossing levels of trade in comparing U.S. and home market sales; (4) refusing to grant NTN a price-based level of trade adjustment; (5) excluding NTN's home market sales to related parties in FMV calculation; (6) rejecting NTN's adjustment for interest on selling expenses; (7) reallocating NTN's U.S. selling expenses based on the sale price to the first unrelated party; (8) making improper adjustments to NTN's COP and CV data; and (9) treating home market discounts attributable to sales of subject merchandise as an indirect selling expense.

NPB asserts Commerce erred in resorting to best information available when NPB failed to report certain negative billing adjustments.

Torrington claims Commerce erred in: (1) incorrectly applying the "Roller Chain" and "knowledge" tests to exclude merchandise imported by Honda Motor Co., Ltd., American Honda Motor Co., Inc., Honda of America Mfg., Inc. and Honda Power Equipment Mfg., Inc.; (2) granting billing, post-sale price and warranty credit adjustments that were not linked to specific sales of in-scope merchandise; (3) accepting Koyo's U.S. freight expenses where air and ocean freight charges were commingled and allocated to all U.S. sales without linkage to specific sales; (4) accepting Koyo's data regarding efficiency variances used in the calculation of COP contrary to its own verification; (5) failing to take into account certain related party commissions paid by NTN with respect to purchase price sales; (6) accepting NTN's designation of certain sales at the aftermarket level of trade and NSK's designation of certain distributor sales as destined to original equipment manufacturers; and (7) committing certain clerical errors.

Held: Plaintiffs and defendant-intervenors' motions for judgment on the agency record are granted in part and denied in part. This case is remanded to Commerce to: (1) apply a tax-neutral VAT methodology; (2) deny the adjustment to FMV for NSK's return rebates and post-sale price adjustments; (3) review the record to (a) determine whether it is possible to remove those portions of Koyo's warranty expenses which relate to non-scope merchandise from the adjustments to FMV or (b) deny the adjustment if such removal cannot be made; (4) deny the adjustment to FMV for NTN's home market discounts at issue; (5) determine whether the NTN billing adjustments not reported on a transaction-specific basis were made solely over in-scope merchandise and, if so, to allow them a direct adjustment to FMV or, if such a determination cannot conclusively be made, to deny them an adjustment to FMV; (6) reopen the record to allow Koyo to submit documentation showing the nature of the expenses Koyo characterized as non-operating expenses; (7) exclude NSK's zero-priced sample transfers from NSK's U.S. sales database; (8) exclude NTN's sample and other similar transfers from NTN's home market sales database; (9) allow NTN's adjustment for interest expenses on antidumping duty cash deposits; (10) recalculate NTN's COP and CV without resort to best information available; (11) examine the acceptance of Koyo's allocation of air freight expenses and, if necessary, request additional information; (12) explain further the basis for accepting Koyo's efficiency variance without adjustment; and (13) correct clerical errors for Koyo (with respect to U.S. and home market doubtful debt, and failure to eliminate a sale of non-scope merchandise from the dumping margin calculation), Nachi (with respect to improper accounting for certain U.S. transactions), NTN and NSK.

[Plaintiffs and defendant-intervenors' motions for judgment on the agency record are granted in part and denied in part. Case remanded.]

(Dated June 17, 1997)

Lipstein, Jaffe & Lawson, L.L.P. (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for plaintiffs and defendant-intervenors NSK Ltd. and NSK Corporation.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis and *Lee Ann Alexander)* for plaintiffs and defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Barnes, Richardson & Colburn (Donald J. Unger and *Kazumune V. Kano)* for plaintiffs and defendant-intervenors NTN Bearing Corporation of America, American NTN Bear-

ing Manufacturing Corp., NTN Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation.

Michael J. Brown for plaintiffs Nippon Pillow Block Sales Co., Inc. and FYH Bearing Units USA.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *Mark A. Barnett, Michelle K. Behaylo, Stacy J. Ettinger, Thomas H. Fine, Dean A. Pinkert* and *David J. Ross*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Patrick J. McDonough and *Timothy C. Brightbill)* for defendant-intervenor and plaintiff The Torrington Company.

Gibson, Dunn & Crutcher (Donald Harrison and *Jerry S. Fowler, Jr.)* for defendant-intervenors Honda Motor Co., Ltd., American Honda Motor Corp., Inc., Honda of America Mfg., Inc. and Honda Power Equipment Mfg., Inc.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs and defendant-intervenors move this Court for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. Plaintiffs and defendant-intervenors challenge the Department of Commerce, International Trade Administration's ("Commerce") final results of the fourth administrative review for antifriction bearings ("AFBs"), entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders ("Final Results")*, 60 Fed. Reg. 10,900 (Feb. 28, 1995).

BACKGROUND

The fourth administrative review encompasses imports of AFBs entered during the fourth review period of May 1, 1992 through April 30, 1993. *See Final Results*, 60 Fed. Reg. at 10,900. The present consolidated action concerns imports from Japan.

On February 28, 1994, Commerce published the preliminary results of the fourth administrative review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, Thailand, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Notice of Intent To Revoke Orders (in Part)*, 59 Fed. Reg. 9,463 (Feb. 28, 1994). On February 28, 1995, Commerce published the Final Results at issue. *See Final Results*, 60 Fed. Reg. at 10,900.

NSK Ltd. and NSK Corporation ("NSK") claims Commerce erred in: (1) failing to apply a tax-neutral methodology in computing the value-added tax ("VAT") adjustment; (2) treating NSK's return rebates and post-sale price adjustments as indirect selling expenses; (3) denying NSK a direct adjustment to foreign market value ("FMV") for home market early payment discounts and distributor incentives; (4) rejecting NSK's lump sum post-sale price adjustments and stock transfer commissions as indirect expenses; (5) not using NSK's purchase prices

for bearings purchased by NSK from related suppliers; (6) improperly calculating exporter's sales price ("ESP") for imported bearing parts further manufactured in the United States; (7) rejecting NSK's reported interest income offset to interest expense in the calculation of cost of production ("COP") and constructed value ("CV"); and (8) including zero-priced sample sales in the U.S. database.

Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") contends Commerce erred in: (1) failing to apply a tax-neutral methodology in computing the VAT adjustment; (2) disallowing certain Koyo home market post-sale price adjustments that were not reported on an invoice- or product-specific basis; (3) investigating the cost of inputs obtained by Koyo from related party suppliers; (4) reclassifying Koyo's non-operating expenses and payments out of retained earnings as production expenses; and (5) committing certain clerical errors.

NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corp., NTN Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation ("NTN") argues Commerce erred in: (1) failing to apply a tax-neutral methodology in computing the VAT adjustment; (2) including sample sales in the FMV calculation; (3) crossing levels of trade in comparing U.S. and home market sales; (4) refusing to grant NTN a price-based level of trade adjustment; (5) excluding NTN's home market sales to related parties in FMV calculation; (6) rejecting NTN's adjustment for interest on selling expenses; (7) reallocating NTN's U.S. selling expenses based on the sale price to the first unrelated party; (8) making improper adjustments to NTN's COP and CV data; and (9) treating home market discounts attributable to sales of subject merchandise as an indirect selling expense.

Nippon Pillow Block Sales Co., Ltd. and FYH Bearing Units USA ("NPB") asserts Commerce erred in resorting to best information available when NPB failed to report certain negative billing adjustments.

The Torrington Company ("Torrington") claims Commerce erred in: (1) incorrectly applying the "Roller Chain" and "knowledge" tests to exclude merchandise imported by Honda Motor Co., Ltd., American Honda Motor Co., Inc., Honda of America Mfg., Inc. and Honda Power Equipment Mfg., Inc. ("Honda"); (2) granting billing, post-sale price and warranty credit adjustments that were not linked to specific sales of in-scope merchandise; (3) accepting Koyo's U.S. freight expenses where air and ocean freight charges were commingled and allocated to all U.S. sales without linkage to specific sales; (4) accepting Koyo's data regarding "efficiency variances" used in the calculation of cost of production contrary to its own verification; (5) failing to take into account certain related party commissions paid by NTN with respect to purchase price sales; (6) accepting NTN's designation of certain sales at the "aftermarket" level of trade and NSK's designation of certain distributor sales as destined to original equipment manufacturers ("OEMs"); and (7) committing certain clerical errors.

DISCUSSION

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *VAT Adjustment:*

NSK, Koyo and NTN request a remand for Commerce to apply a tax-neutral amount, rather than rate, methodology in computing the VAT adjustment to U.S. price. NSK's Mem. Supp. Mot. J. Agency R. at 52–53; Koyo's Mem. Supp. Mot. J. Agency R. at 8–10; NTN's Mem. Supp. Mot. J. Agency R. at 47–48. Commerce consents to a remand so that it may apply a tax-neutral methodology. Def.'s Partial Opp'n to Mots. J. Agency R. at 7–10.

In light of *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1580 (Fed. Cir. 1995), requiring Commerce to apply a tax-neutral methodology, the Court agrees that remand is appropriate. This case is therefore remanded to Commerce to apply a tax-neutral methodology in computing the VAT adjustment to U.S. price for NSK, Koyo and NTN.

2. *FMV Adjustments for Various Home Market Post-Sale Adjustments:*

In calculating FMV and U.S. price, Commerce must determine the price actually charged by a respondent for the merchandise at issue, including discounts, rebates and price adjustments. *See* 19 U.S.C. §§ 1677a & 1677b (1988). Commerce believes the effect of allowing allocations for price adjustments that are averaged over all sales is to distort the actual price paid for each specific sale. Commerce has therefore primarily required respondents to provide transaction-specific information before allowing direct adjustments to FMV for discounts, rebates and post-sale price adjustments ("PSPAs").

Upon denying a direct adjustment to FMV for certain selling expenses directly related to underlying sales, Commerce has allowed certain price adjustments to be allocated as indirect selling expenses under the ESP offset. However, this practice was recently rejected by the United States Court of Appeals for the Federal Circuit ("CAFC"). In *Torrington Co. v. United States*, 82 F.3d 1039 (Fed. Cir. 1996), the CAFC had to determine whether certain PSPAs to FMV were appropriate. The PSPAs at issue involved the correction of invoicing errors and retroactive price changes

recorded only on a customer-specific basis. The Court first noted that the determining factor for whether PSPAs qualify for ESP offset treatment is on the PSPA calculation method, not the recordation or allocation method.[1] The Court then found the following:

> Both kinds of PSPA [at issue] involve adjustments to the price of a product, or group of products, made in response to billing errors for a particular customer or in response to the post-sale raising or lowering of the price for a particular customer.

Torrington, 82 F.3d at 1050. The CAFC went on to conclude that, because these PSPAs represent expenses related to a particular sale or sales, they vary with the quantity of the item sold, and so, constitute direct selling expenses.[2] However, the CAFC noted that 19 C.F.R. § 353.56(b)(2) explicitly disallows direct selling expenses from being deducted from FMV as ESP offsets. *Torrington*, 82 F.3d at 1051 (citing *Sharp Corp. v. United States*, 63 F.3d 1092, 1096 (Fed. Cir. 1995) (stating 19 C.F.R. § 353.56(b)(2) provides for a deduction from FMV for all selling expenses *except* direct selling expenses)); *see also Timken Co. v. United States*, 20 CIT ____, ____, 930 F. Supp. 621, 632 (1996).

NSK, NTN, Koyo and Torrington contest Commerce's treatment of certain post-sale price adjustments in this review.

a. *NSK's Adjustments:*

NSK contends Commerce improperly: (1) treated NSK's return rebate and post-sale price adjustments as indirect selling expenses; (2) denied NSK a direct adjustment to FMV for NSK's home market early payment discounts and distributor incentives; and (3) rejected NSK's lump sum post-sale price adjustments and stock transfer commissions as indirect expenses.[3] NSK's Mem. Supp. Mot. J. Agency R. at 21–34.

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[1] Commerce claims that, unlike other adjustments, adjustments for PSPAs are *not* made pursuant to the circumstances-of-sale ("COS") adjustment contained in 19 U.S.C. § 1677b(a)(4)(B) and 19 C.F.R. § 353.56(a). Def.'s Partial Opp'n to Mots. J. Agency R. at 11 n.3. This is not entirely clear, as the *Torrington* court noted FMV may be adjusted for PSPAs under the COS provision if Commerce concludes that a respondent's PSPAs constitute direct selling expenses. *See* 82 F.3d at 1051 nn. 17–18 (referring to *Smith-Corona Group v. United States*, 713 F.3d 1568, 1580 (Fed. Cir. 1983) (COS adjustment allowed for rebates having a reasonably direct relationship to the sales under consideration and where the value determinations are based on proof of actual costs)).

[2] In the Court of International Trade opinion on appeal, the Court decided respondent was not allowed a deduction for its PSPAs because they were calculated using data for both in-scope and out-of-scope merchandise. *See Torrington*, 19 CIT ____, ____, 818 F. Supp. 1563, 1578–79 (1995). As noted above, however, the CAFC came to the same conclusion on different grounds, noting 19 C.F.R. § 353.56(b)(2) explicitly disallows direct selling expenses from being deducted from FMV under the ESP offset. *Torrington*, 82 F.3d at 1051.

[3] NSK has brought to the Court's attention that Commerce made direct adjustments to FMV for the identical NSK expenses at issue here (and an indirect adjustment for stock transfer commissions) in the fifth and sixth administrative reviews. Letter from Lipstein, Jaffe & Lawson, L.L.P., attorneys for NSK, to Raymond F. Burghardt, Clerk of the Court (May 30, 1997). NSK states Commerce's acceptance of these expenses in these subsequent reviews illustrates how Commerce believes such expenses should be treated in this case. NSK supports its position by noting that Commerce indicated its new regulations for the allocation of expenses and price adjustments, issued in conformance with the Uruguay Round Agreements Act ("URAA") and applicable beginning with the sixth review, simply codify its past practice. *Id.* (citing *Antidumping Duties; Countervailing Duties* ("*New Regulations*"), 62 Fed. Reg. 27,296, 27,346) (May 19, 1997).

As Commerce stated as background for its new regulations, "neither the pre-URAA statute nor the Department's prior regulations addressed allocation methods [for expenses and price adjustments] * * *. Instead, the Department and the courts resolved these issues on a case-by-case basis." *New Regulations*, 62 Fed. Reg. at 27,346. The Court concludes that Commerce's recent effort to establish more consistent guidelines and decrease litigation over allocation issues has no bearing on litigation over Commerce's previous determinations. In particular, Commerce's prior methodology of acceptance of expenses and price adjustments as direct adjustments to FMV primarily pursuant to transaction-specific verification has been approved by this Court and the CAFC and is applicable to this case. *See, e.g., Torrington Co. v. United States*, 20 CIT ____, ____, 930 F. Supp. 1151, 1158 (1996) (stating respondent's inability to tie PSPAs to particular sales prevented Commerce from allowing a direct adjustment to FMV for PSPAs at issue). This reasoning holds true for Commerce's pre-URAA fifth review determinations, which must also be resolved on an individual basis.

To retain its Japanese OEM customers that purchased products through distributors yet prevent these distributors from reaping huge profits through sales to aftermarket customers, NSK established a return rebate program. In this program, NSK sells bearings to distributors at a provisional price equal to prices NSK charges to aftermarket customers, but rebates a percentage of this price following proof of the quantities and price charged by the distributor to the OEM. The NSK PSPAs at issue involve the correction of clerical errors, the finalization of a temporary sale price and the price adjustments for changes negotiated subsequent to sale.

NSK claims its return rebates and PSPAs should have been treated as direct expenses because they were essentially reported on a transaction-specific basis and, therefore, are directly linked to underlying sales. *See* NSK's Mem. Supp. Mot. J. Agency R. at 23–26; NSK's Reply Mem. Supp. Mot. J. Agency R. at 3–6. While NSK concedes that its business records did not allow it to calculate the return rebates on a transaction-specific basis, it maintains that, because its return rebates did not vary during the review period, its methodology adjusted the selling price of each transaction to reflect the rebate actually paid by NSK to the distributor. NSK's Mem. Supp. Mot. J. Agency R. at 23.

Commerce maintains it properly dealt with NSK's return rebates and PSPAs as indirect expenses because they were not reported on a transaction-specific basis. Def.'s Partial Opp'n to Mots. J. Agency R. at 15–18.

Torrington agrees Commerce should not allow NSK a direct adjustment to FMV for return rebates and PSPAs. Torrington's Opp'n to Mots. J. Agency R. at 10–14. However, Torrington argues Commerce should not allow even an indirect adjustment to FMV for NSK's PSPAs because: (1) PSPAs are, by nature, price adjustments incurred on, and inseparable from, specific transactions, not selling expenses incurred on all sales; and (2) allowing PSPAs that do not qualify as direct adjustments to price to be treated as indirect selling expenses is erroneous.[4] Torrington's Mem. Supp. Mot. J. Agency R. at 41, 42–45.

As a preliminary matter, the case to which Torrington cites for support, *RHP Bearings v. United States*, 19 CIT ___, 875 F. Supp. 854 (1995), is distinguishable, as it deals with technical service expenses in the U.S. market, which are treated differently than PSPAs in the home market. *See Torrington Co. v. United States*, 17 CIT 672, 684, 832 F. Supp. 365, 376 (1993) (stating Commerce may treat similar expenses differently in the calculation of U.S. price and FMV).

Commerce verified that the return rebate program directly related to sales of in-scope bearings to certain distributors, *i.e.*, NSK kept track of sales to each distributor of standard part numbers eligible for the re-

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[4] NSK responds Torrington failed to exhaust its administrative remedies and the NSK adjustments at issue here qualify as selling expenses. NSK's Opp'n to Torrington's Mot. J. Agency R. at 11–16. First, the Court concludes Torrington sufficiently raised this issue regarding price adjustments at the administrative level. *See Torrington's Administrative Case Brief*, P.R. Doc. No. 358, Fiche 144, Frames 44, 46 (March 1, 1994). The Court, nevertheless, concludes the billing adjustments at issue are selling expenses. *See Torrington*, 82 F.3d at 1050–51 (treating similar billing adjustments as selling expenses).

The confidential version of the administrative record is designated "C.R." and the public record is designated "P.R."

bate, less resales by the distributor for which a rebate had already been paid. *See NSK HM Sales Verification Report*, P.R. Doc. No. 342, at 9–10, Def.'s App., Ex. 18, at 9–10 (March 4, 1994). Further, as NSK's PSPAs normally occur after the original sale, Commerce verified that NSK's records link these expenses on a product- and customer-specific basis, but not to the exact original sale. *Id.* at 10–11.

Similar to the PSPAs at issue in *Torrington*, therefore, NSK's return rebates and PSPAs represent expenses related to particular sales of in-scope merchandise and vary with the quantity of the particular item sold. While Commerce could not allow these expenses a direct adjustment because of NSK's failure to tie them to specific transactions and ensure they are not attributable to sales of non-scope merchandise, this does not deprive them of their direct relationship to the sales under consideration. *See INA Walzlager Schaeffler KG v. United States*, 21 CIT ____, ____, 957 F. Supp. 251, 267 (1997); *Torrington*, 20 CIT at ____, 926 F. Supp. at 1158. Consequently, pursuant to the CAFC's decision in *Torrington*, Commerce improperly treated the expenses as indirect. This case is remanded to Commerce to deny the adjustment to FMV for NSK's return rebates and PSPAs.

NSK further disputes Commerce's treatment of its early payment discounts, where NSK offered a discount to distributors who paid their invoices before the payment due date, and distributor incentives, where NSK offered payments to distributors as incentives for increases in their sales to approved sub-distributors. NSK's Mem. Supp. Mot. J. Agency R. at 8, 9. Similar to NSK's other PSPAs, NSK was unable to link the discounts to individual transactions. Further, NSK calculated the distributor incentive rebates on the basis of sales to *all* products to distributors, and not on a specific-model basis. Commerce therefore denied direct adjustment to FMV for the early payment discounts and distributor rebate incentives. *Final Results*, 60 Fed. Reg. at 10,935.

NSK claims Commerce improperly denied it a direct FMV adjustment for its early payment discounts and distributor rebate incentives because they were directly related to individual transactions. NSK's Mem. Supp. Mot. J. Agency R. at 27–31; NSK's Reply Mem. Supp. Mot. J. Agency R. at 6–9. NSK argues that Commerce, at a minimum, should have granted a direct adjustment for NSK's sales to four distributors granted discounts as a fixed and constant percentage of sales on all transactions for which they were reported. NSK's Mem. Supp. Mot. J. Agency R. at 28 (citing *Final Results*, 60 Fed. Reg. at 10,935).

In response, Commerce maintains NSK could not demonstrate that its early payment discounts and distributor rebate incentives did not include discounts or rebates on non-scope merchandise. Hence, they were not entitled to a FMV adjustment. Def.'s Partial Opp'n to Mots. J. Agency R. at 18–20. Torrington agrees generally with Commerce's rationale in denying the direct adjustment. Torrington's Opp'n to Mots. J. Agency R. at 15–19.

Upon inspection of the record, the Court agrees with Commerce that NSK cannot tie its early payment discounts and distributor incentive rebates to particular sales, and so, the amount to which they are attributable to non-scope merchandise is unclear. This holds true even for the early payment discounts granted to the four distributors to which NSK refers. While Commerce verified that discounts to the four distributors had remained relatively stable during the period of investigation, *see Final Results*, 60 Fed. Reg. at 10,935, NSK could not tie these discounts to specific transactions, and so, could not ensure what amount was granted to in-scope merchandise. *See Torrington*, 20 CIT at ____, 926 F. Supp. at 1157–58. Consequently, Commerce properly disallowed a direct adjustment for these expenses.

NSK's final claim involves its lump sum PSPAs, granted on a customer-specific basis, and its stock transfer commissions, where NSK would pay a distributor a commission for purchasing from another distributor a particular part number NSK did not have available. NSK's Mem Supp. Mot. J. Agency R. at 10–12.

NSK claims Commerce should have treated these expenses as indirect expenses because they did not vary with the quantity of merchandise sold. NSK therefore contends they should have been included in the ESP offset without any requirement that they be linked to in-scope sales. *Id.* at 31–33; NSK's Reply Mem. Supp. Mot. J. Agency R. at 10–12.

Commerce responds it properly denied the adjustments because they were made on both in-scope and out-of-scope merchandise. Def.'s Partial Opp'n to Mots. J. Agency R. at 20–22. Torrington agrees generally with the position taken by Commerce. Torrington's Opp'n to Mots. J. Agency R. at 20–24.

Pursuant to the CAFC's decision in *Torrington*, the Court concludes NSK's lump sum PSPAs are direct expenses because they account for price changes calculated with respect to a specific customer for a specific period of time. Hence, NSK's lump sum PSPAs are direct expenses, which may not be the basis for a deduction from FMV pursuant to the ESP offset. *See Timken Co. v. United States*, 20 CIT at ____, 930 F. Supp. at 633. Further, while the stock transfer commissions paid on all products was a fixed percentage of the sales price, NSK could not isolate the percentage of commissions paid to distributors for stock transfers of the subject merchandise between distributors. *See NSK Section C Questionnaire Response*, P.R. Doc. No. 126, NSK's App., Ex. 5, at 50–51 (Sept. 29, 1993). Consequently, NSK's stock transfer commissions are also direct expenses, and so, are not entitled to ESP offset treatment.

b. *Koyo's Adjustments:*

(1) *Koyo's PSPAs*

Koyo originally claimed Commerce improperly disallowed its adjustment to FMV for its PSPAs because Commerce determined they were made or recorded on a lump sum basis and did not distinguish between in-scope and out-of-scope merchandise. Koyo's Mem. Supp. Mot. J. Agency R. at 10–11 (citing *Final Results*, 60 Fed. Reg. at 10,931).

In light of the CAFC's decision in *Torrington*, Koyo has decided to no longer pursue this claim. Koyo's Reply Mem. Supp. Mot. J. Agency R. at 3. Consequently, Koyo's claim regarding its PSPAs is dismissed.

(2) *Koyo's Warranty Expenses*

Commerce adjusted for Koyo's home market warranty expenses as direct expenses pursuant to the COS provision. *Final Results*, 60 Fed. Reg. at 10,910. Torrington challenges Commerce's treatment of Koyo's warranty expense, arguing Koyo did not provide product- or customer-specific warranty credits. Torrington's Mem. Supp. Mot. J. Agency R. at 41–42.

Commerce agrees with Torrington and requests a remand to review the record to determine whether it is possible to remove those portions of Koyo's warranty expenses which relate to non-scope merchandise from the adjustments to FMV or to deny the adjustment if such removal cannot be made. Def.'s Partial Opp'n to Mots. J. Agency R. at 22–23.

Koyo objects to a remand, claiming Commerce's treatment of its warranty expenses was proper and is distinguishable from the situation involving its PSPAs. Koyo's Opp'n to Torrington's Mot. J. Agency R. at 8–17.

Upon inspection of the record, the Court agrees Commerce improperly included Koyo's warranty expenses relating to non-scope merchandise in adjusting FMV. *See Koyo Section C Questionnaire Response*, P.R. Doc. No. 124, Def.'s App., Ex. 6, at 31–33 (Sept. 29, 1993). The Court therefore remands this issue to Commerce to review the record to determine whether it is possible to remove those portions of Koyo's warranty expenses which relate to non-scope merchandise from the adjustments to FMV or to deny the adjustment if such removal cannot be made.

c. *NTN's Adjustments:*

(1) *Home Market Discounts*

In the Final Results, Commerce treated NTN's home market discounts as indirect selling expenses. 60 Fed. Reg. at 10,934. NTN asserts Commerce should have treated these discounts as direct selling expenses because it accounted for its discounts using proper product categories, and so, that there was no general pooling of discounts for each customer. NTN's Mem. Supp. Mot. J. Agency R. at 44–46.

Commerce responds it treated the discounts as indirect selling expenses because they were not reported on a transaction-specific basis and because they were not fixed and constant expenses. Def.'s Partial Opp'n to Mots. J. Agency R. at 24–27. Torrington agrees with Commerce's position. Torrington's Opp'n to Mots. J. Agency R. at 86–89.

The Court concludes that Commerce improperly determined that the discounts at issue are indirect selling expenses. Rather, they are direct selling expenses because they represent expenses related to particular sales of in-scope merchandise. While they are not entitled to a direct adjustment because of NSK's failure to tie them to specific transactions, this does not deprive them of their direct relationship to the sales under consideration. Therefore, pursuant to the CAFC's decision in *Torring-*

ton, this issue is remanded to Commerce to deny the adjustment to FMV for NTN's home market discounts at issue.

(2) *Billing Adjustments*

In the Final Results, Commerce treated certain NTN billing adjustments as direct adjustments to price, stating it had "no reason to believe or suspect that NTN failed to report accurately or completely its [home market] billing adjustments, or that NTN's method of reporting may have included billing adjustments made on sales of non-subject merchandise." 60 Fed. Reg. at 10,934–35.

NTN claims its total sales value figures were net of billing adjustments, which should have been treated as direct expenses, and asserts Commerce should recalculate NTN's margins based on sales prices net of billing adjustments. NTN's Mem. Supp. Mot. J. Agency R. at 46–47.

Torrington alleges Commerce improperly treated certain NTN post-sale billing adjustments that had not been reported on a transaction-specific basis as direct adjustments to FMV. Torrington's Opp'n to Mots. J. Agency R. at 40.

Commerce responds that there was no evidence that NTN's total sales value figures were reported net of billing adjustments, and so, it properly concluded not to make additional adjustments to the individual sales values for billing adjustments in its formula for calculating expenses for each individual sale. Def.'s Partial Opp'n to Mots. J. Agency R. at 24–26. However, Commerce agrees with Torrington and requests a remand to review the record to determine whether it is possible to distinguish between billing adjustments reported on a transaction-specific basis and those reported on a customer-specific or product-specific basis or, if a distinction cannot be made, to treat all NTN's billing adjustments as indirect selling expenses. *Id.* at 27.

NTN maintains Commerce's direct price adjustments for its billing adjustments was reasonable. NTN's Opp'n to Torrington's Mot. J. Agency R. at 11–12.

The Court concludes it is unclear whether NTN's total sales value figures were reported net of billing adjustments because the evidence on the record does not establish the manner in which NTN calculated the total sales value figure. In essence, there is no specific evidence that all billing adjustments had been accounted for in NTN's total sales value figure. Hence, Commerce properly declined to make additional adjustments.

With respect to Torrington's claim, certain NTN billing adjustments were indeed not reported on a transaction-specific basis. *See NTN Supplemental Section C Questionnaire Response*, C.R. Doc. No. 95, Def.'s App., Ex. 28, at 11–12 (Dec. 8, 1993). Nevertheless, the relevant issue regarding direct adjustments is ultimately not whether they were reported on a transaction-specific basis, but whether a respondent can demonstrate that its adjustments were not made over non-subject merchandise. *See Federal-Mogul Corp. v. United States*, 20 CIT ___, ___, 950 F. Supp. 1179, 1184–85 (1996) (Commerce properly excluded billing adjustments not recorded on a transaction-specific basis where adjust-

ments on non-scope merchandise could not be removed). Hence, this issue is remanded to Commerce to determine whether the NTN billing adjustments not reported on a transaction-specific basis were made solely over in-scope merchandise and, if so, to allow them a direct adjustment to FMV or, if such a determination cannot conclusively be made, to deny them a direct adjustment to FMV.

3. *COP Data of Inputs Obtained from Related Parties:*

a. *NSK's CV Calculation:*

During the review, Commerce used the COP data of inputs that NSK obtained from related parties to determine whether the inputs were sold at arm's-length. In cases where Commerce concluded that they had not been sold at arm's-length, Commerce used the COP of the inputs as the "best evidence available" for valuing the inputs. *See Final Results*, 60 Fed. Reg. at 10,924.

NSK contends Commerce is authorized to request COP data for inputs only when it has reason to believe or suspect that the inputs were sold below-COP, which was not the case here. NSK further argues that, in this case, Commerce ignored evidence that the prices negotiated between NSK and its related supplier, Supplier X, fairly reflected market value, *i.e.*, that its inputs were sold at arm's length prices. NSK's Mem. Supp. Mot. J. Agency R. at 34–43. In addition, NSK claims Commerce illegally coerced NSK to place COP information for finished bearings purchased from related suppliers on the record because it feared another application of best information available ("BIA"). *Id.* at 43.

Commerce responds that it was authorized to request NSK's COP data pursuant to 19 U.S.C. § 1677b(e)(2) and the Court's decision in *NSK Ltd. v. United States*, 19 CIT ____, 910 F. Supp. 663 (1995). Def.'s Partial Opp'n to Mots. J. Agency R. at 32–35. Commerce further maintains that, even if it is authorized to request COP data of inputs only when it has reason to believe or suspect that the inputs were sold at below-COP, it had such grounds in this case due to its conclusions in the third review. *Id.* at 34–35 (citing *Final Results*, 60 Fed. Reg. at 10,924). Further, Commerce claims it is not required to consider subjective facts regarding the dealings between NSK and Supplier X before resorting to the COP of an input for that input's market value. *Id.* at 37–38.

Commerce was authorized to request cost data to determine whether the transfer prices were at arm's length pursuant to 19 U.S.C. § 1677b(e)(2). Pursuant to the relevant statutes, Commerce must determine whether transfer prices are at arm's-length. *See id.* Commerce does this by comparing the transfer prices to: (1) the prices that the related suppliers charge to unrelated parties; and (2) the prices charged by unrelated suppliers to the respondent. If a transaction is disregarded because a respondent cannot establish that it was made at arm's-length, and there are no other such arm's-length prices to compare with the transfer prices for components, pursuant to 19 U.S.C. § 1677b(e)(2), Commerce is to rely on the best evidence available to determine the value of the element of value. *See NSK*, 19 CIT at ____, 910 F. Supp. at

669–70. In the third review period, where NSK also relied upon transfer prices, this Court concluded the following:

> If based on the information considered, Commerce finds that transfer prices do not "fairly reflect the amount usually reflected in sales in the market under consideration," then Commerce may disregard these transactions in favor of the best evidence available if "there are no other transactions available for consideration." * * * 19 U.S.C. § 1677b(e)(2) provides a basis for Commerce to request cost data about parts purchased from related suppliers as long as the respondents reported or relied on transfer prices. Thus, 19 U.S.C. § 1677b(e)(2) applies in the case at bar because NSK reported transfer prices in its * * * questionnaire response.

Id. at 669 (citations omitted). In *NSK*, therefore, the Court found Commerce properly requested COP data pursuant to 19 U.S.C. § 1677b(e)(2) since the respondent reported and relied upon transfer prices. *Id.* at 669–70. As in *NSK*, in this case NSK provided no information regarding prices from unrelated parties upon which to determine the market value for inputs it purchased from related suppliers but, rather, reported and relied upon transfer prices. *See Final Results*, 60 Fed. Reg. at 10,924. Hence, Commerce had the authority to request COP data under 19 U.S.C. § 1677b(e)(2).

It is further clear to this Court that, when there are no purchases of inputs from unrelated suppliers, Commerce may reasonably base the market value of inputs on the COP of inputs. In this case, Commerce used NSK's COP data without addressing record evidence regarding whether NSK's purchases from Supplier X were at market value, asserting in its brief that it "appropriately concluded that subjective facts regarding the dealing between NSK and supplier X were not relevant to its determination." Def.'s Partial Opp'n to Mots. J. Agency R. at 38. Under the statute, Commerce is not required to examine the subjective information relating to the dealings between NSK and its related suppliers over evidence that prices between related parties were not at arm's-length. Indeed, 19 U.S.C. § 1677b(e)(2) contemplates a comparison of the *amount* representing an element of value and the *amount* usually reflected in sales of the merchandise in the market. As Commerce explained in the Final Results, "[l]acking information as to what the market value is, we rely on the related supplier's cost as a measure of the commercial value of that input." 60 Fed. Reg. at 10,924. The Court finds this process reasonable and in accordance with law.

Finally, NSK's claim that it placed COP information on the record for finished bearings from related suppliers because it feared another application of BIA, and so, such data was "illegally coerced" is without merit. In *NSK*, 19 CIT at ___, 910 F. Supp. at 671, the Court found Commerce improperly resorted to BIA for finished bearings purchased from related suppliers. Unlike the third review, Commerce did not resort to BIA in this case but, rather, used NSK's COP information. *See Final Results*, 60 Fed. Reg. at 10,924. Despite NSK's reasons for including this

COP information on the record, Commerce may properly rely on such information once it is on the record.

Consequently, the Court concludes that Commerce properly requested and used COP data for inputs that NSK obtained from related suppliers.

b. *Koyo's CV Calculation:*

Koyo claims Commerce lacked authority to request COP data of inputs Koyo obtained from related parties, and maintains Commerce may only request such data under § 1677b(e)(3) when Commerce has reason to believe or suspect that the inputs were sold below cost. Pursuant to the above reasoning regarding NSK's inputs, and in accordance with *NSK*, 19 CIT at ____, 910 F. Supp. at 669–70, the Court concludes Commerce had the authority to request Koyo's COP data at issue.

4. *ESP Calculation for NSK Parts Further Manufactured in the U.S.:*

During the review, Commerce calculated ESP pursuant to section 1677a(e)(3)[5] for NSK's AFB parts that were further manufactured in the U.S. prior to their sale to the first unrelated purchaser as completed AFBs. Section 1677a(e)(3) states that if an ESP transaction is involved and the imported merchandise has been further manufactured in the U.S. before the sale to the first unrelated purchaser, then ESP must be reduced by the increased value, including labor and materials, incurred by the additional U.S. manufacturing or assembly. *See* 19 U.S.C. § 1677a(e)(3).

NSK contends that, according to the legislative history, Section 1677a(e)(3) applies only to products covered by an antidumping duty order that are further manufactured in the U.S. into *non-scope* merchandise containing a significant amount of the in-scope imported product. NSK therefore maintains that Commerce should have based margins for imported parts on the margins calculated for *finished* bearings of the same class or kind. NSK's Mem. Supp. Mot. J. Agency R. at 44–47.

In response, Commerce maintains its use of 19 U.S.C. § 1677a(e)(3) to calculate ESP for NSK's further manufactured AFB parts is supported by the statutory language and the case law. Def.'s Partial Opp'n to Mots. J. Agency R. at 41–48.

In support of its position, NSK points to the House of Representatives committee report on the section, which states the following:

> This amendment provides that whenever * * * [there is an ESP situation], *and the merchandise is changed by further process or manufacture so as to remove it from the class or kind of merchandise involved in the proceeding* before it is sold to an unrelated purchaser, such merchandise will not escape the purview of the law * * *.

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[5] Section 1677a(e)(3) states, in relevant part:

(e) Additional adjustments to exporter's sales price

For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

* * * * * * * *

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

> * * * [T]his amendment shall be applicable only if the manufactured or assembled product that is sold to an unrelated person contains more than an insignificant amount of the imported merchandise.

H.R. Rep. No. 571, 93d Cong., 1st Sess. 70 (1973) (emphasis added); *see also* S. Rep. No. 1298, 93d Cong., 2d Sess. 172–73 (1974).[6] NSK's position, while somewhat supported by the language of the legislative history, is incorrect.

First, the Court is to use legislative history to ascertain Congress's intent where a statute is ambiguous, but not to introduce ambiguity where statutory language is clear. *See Terumpo Corp. v. United States*, 8 CIT 44, 46 (1984); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (Citations omitted). In this case, the statute is abundantly clear as to its intent: to reduce the price to the first unrelated purchaser in calculating ESP for an imported product that has been further processed. Hence, it is not necessary for the Court to refer to the legislative history.

Nevertheless, the legislative history does not directly address the situation at issue here, where the imported scope merchandise is further manufactured or assembled into *scope* merchandise. Rather, it sets forth Congress' intent that a further-processed scope part used in non-scope merchandise cannot escape the application of the dumping law unless the imported scope part comprises an insignificant amount of the non-scope merchandise. Hence, the legislative history does not preclude the application of the section to situations where the ultimate product sold is *in* scope. Indeed, the employment of NSK's interpretation of the statute would permit minor processing to exempt imports from an antidumping order, thus thwarting the purpose of the antidumping law.

Further support for the Court's position is found in NSK's challenge to the second review, where this Court concluded, and the CAFC recently affirmed, that Section 1677a(e)(3) covers imported parts utilized in the production of AFBs, and so, the parts are subject to a further-manufacturing analysis.[7] *See NSK*, 19 CIT ___, ___, 896 F. Supp. 1263, 1268–71 (1995), *aff'd in part and rev'd in part*, Slip Op. 96–1359, at

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[6] In accordance with this apparent congressional intent, when an imported item constitutes an insignificant amount of a complete final product, Commerce has decided that Section 1677a(e)(3) should not be applied to the insignificant import, which should be excluded from the coverage of review. This principle has come to be known as the "Roller Chein" rule. *See Roller Chain, Other Than Bicycle, From Japan; Final Results of Administrative Review of Antidumping Finding*, 48 Fed. Reg. 51,801, 51,804 (Nov. 14, 1983) (an imported chain incorporated into a finished motorcycle constituted an insignificant amount of the finished motorcycle).

[7] NSK claims that Commerce has admitted in prior proceedings that it cannot use Section 1677a(e)(3) to reduce ESP for the amount of any value added to bearing parts further manufactured or assembled in the U.S. into the same class or kind of merchandise. NSK's Mem. Supp. Mot. J. Agency R. at 45–46. Commerce has made no such admission, but has merely employed various simplification techniques that excluded further-processed merchandise from its price comparisons. *See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Antidumping Duty Administrative Reviews*, 56 Fed. Reg. 11,186, 11,187–88 (March 15, 1991); *Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,029 (May 3, 1989). Further, in the second review, the Court upheld Commerce's decision to include information on sales of further-processed merchandise.

25–26 (Fed. Cir. June 10, 1997). *See also NSK*, 19 CIT at ___, 910 F. Supp. at 677; *Koyo Seiko Co. v. United States*, 18 CIT 740, 747, 861 F. Supp. 108, 114–15 (1994) (imported AFB parts further assembled in U.S. qualify as additional material and labor and require an adjustment for further processing under Section 1677a(e)(3)).

The Court therefore concludes that Commerce's interpretation is reasonable and carries out the congressional intent of reducing the price to the first unrelated purchaser of a further processed import. Consequently, Commerce properly used 19 U.S.C. § 1677a(e)(3) to calculate ESP for NSK's imported parts that were further-processed into completed AFBs in the U.S.

5. *NSK's Claimed Interest Income Offset to Interest Expense:*

In calculating COP and CV during the review, Commerce denied NSK's claimed interest income offset to interest expense and resorted to BIA. *Final Results*, 60 Fed. Reg. at 10,928–29. NSK claims that, in doing so, Commerce departed from its standard practice.

Commerce responds it resorted to BIA because NSK failed to explain how its reported interest income offset was related to its bearing manufacturing operations. Def.'s Partial Opp'n to Mots. J. Agency R. at 48–52. Commerce points to the following problems with NSK's methodology, which it noted in the Final Results: (1) NSK applied a ratio of short-term versus long-term investments to total interest income; and (2) NSK failed to link short-term interest income to business operations. *See id.* (citing 60 Fed. Reg. at 10,929).

Torrington agrees that Commerce properly denied NSK's interest income offset because NSK failed to substantiate its alleged short-term interest income. Torrington's Opp'n to Mots. J. Agency R. at 37–43.

The Court concludes Commerce's denial of NSK's reported interest income offset to interest expense is proper. This Court has recognized Commerce's practice of limiting interest income offset to interest expense for income items shown to have been earned from the general operations of the company in calculating COP and CV. *See NTN Bearing Corp. v. United States*, 19 CIT ___, ___, 905 F. Supp. 1083, 1096–97 (1995); *Timken v. United States*, 18 CIT 1, 9, 852 F. Supp. 1040, 1048 (1994). During verification in this case, NSK provided a non-consolidated "detail of interest income." *See NSK COP/CV Verification*, C.R. Doc. No. 147, Def.'s App., Ex. 23. Although this document provided a general description of the types of short-term assets that had generated its income, it did not provide a list of the actual accounts or explain the nexus between the interest income and NSK's bearing manufacturing operations. Consequently, in accordance with the court-approved methodology, Commerce properly denied NSK's reported interest income offset and resorted to BIA.

6. *Inclusion of NSK's U.S. Zero-Priced Sample Transfers:*

Commerce included NSK's zero-priced sample transfers to U.S. customers in NSK's U.S. sales database for the margin calculation. *Final Results*, 60 Fed. Reg. at 10,948. NSK contends the samples in question

cannot be considered sales because there was no exchange of monetary consideration. NSK's Mem. Supp. Mot. J. Agency R. at 50–51. In *NSK, Ltd. v. United States*, 20 CIT ____, ____, Slip Op. 96–50, at 6 (1996), this Court upheld Commerce's inclusion of NSK's zero-priced sample transfers because excluding such merchandise "creates a loophole in the antidumping law allowing the lowest priced U.S. transactions to escape review and threatens the effectiveness of the law."

The CAFC recently addressed this issue and reversed the Court's decision in *NSK*, concluding that NSK's transfers of free samples to potential U.S. customers did not amount to sales. *NSK*, Slip Op. 96–1359, at 17–21. The CAFC reasoned that Congress intended to give the term "sale" its ordinary meaning, hence precluding NSK's free samples from being treated as sales because they lacked consideration and because there was no evidence that the potential customers had any obligation regarding the samples but, rather, "were free to transact with NSK based solely on their whim." *Id.* at 20.

In light of *NSK*, Slip Op. 96–1359, at 17–21, the Court has no alternative but to find that NSK's free samples to U.S. customers in this case were not sales. This issue is therefore remanded to Commerce to exclude NSK's zero-priced sample sales from NSK's U.S. sales database.

7. *Inclusion of NTN's Home Market Sample and Similar Transfers:*

NTN claims Commerce should have excluded NTN's sample and other similar transfers from its home market database because they were made outside the ordinary course of trade. NTN's Mem. Supp. Mot. J. Agency R. at 14–16.

Pursuant to the CAFC's recent decision in *NSK*, Slip Op. 96–1359, at 17–21, sample transfers do not amount to sales under the dumping statute because there is typically no consideration involved. Similar to NSK's samples in this review, there is no evidence that NTN's sample transfers involved consideration in this case. Consequently, the Court concludes Commerce improperly included NTN's sample and other similar transfers in NTN's home market database and remands to Commerce to exclude them from the FMV calculation.

8. *Koyo's Non-Operating Expenses:*

During the review, Commerce reclassified certain Koyo non-operating expenses and payments out of retained earnings as production expenses. *Final Results*, 60 Fed. Reg. at 10,926. Koyo claims this reclassification was improper because the expenses at issue were not related to domestic production. Koyo further contends Commerce's reclassification is contrary to Commerce's prior practice. Koyo's Mem. Supp. Mot. J. Agency R. at 17–23.

Commerce agrees a remand is necessary to allow Koyo to submit documentation showing that the nature of the expenses Koyo characterized as non-operating is appropriate. Def.'s Partial Opp'n to Mots. J. Agency R. at 56–57.

Torrington maintains Commerce properly reclassified the expenses and claims Koyo's management had ample opportunity to explain the

various categories for expenses at verification. Torrington's Opp'n to Mots. J. Agency R. at 53–56.

Upon review of the record, the Court agrees with Commerce that the record contains insufficient data upon which to determine the exact nature of the expenses at issue. Consequently, this issue is remanded to Commerce to reopen the record to allow Koyo to submit documentation showing the nature of the expenses Koyo characterized as non-operating expenses.

9. *Treatment of NTN's AFB Sales Sold at Different Levels of Trade:*

a. *Comparison of Sales Across Different Levels of Trade:*

Under 19 U.S.C. § 1677b(a)(4)(B), Commerce must compare a U.S. price and FMV that are free of distortion caused by "other differences in circumstances of sale." To account for one such distortion, differing levels of trade, Commerce normally calculates FMV and U.S. price based on sales at the same commercial level of trade. *See* 19 C.F.R. § 353.58.

NTN claims Commerce erred in comparing merchandise across levels of trade because it did not explain its decision to cross levels of trade and did not consider the commercial value of the merchandise sold at various levels of trade. NTN's Mem. Supp. Mot. J. Agency R. at 16–18.

Commerce responds that it compared sales at different levels of trade because it failed to match "such or similar" merchandise at the same level. Commerce further maintains that it properly considered commercial value by applying its twenty percent cost test. Def.'s Partial Opp'n to Mots. J. Agency R. at 60–63.

Commerce may cross levels of trade when sales at the same level of trade are not available. *See* 19 C.F.R. § 353.58; *see also NTN Bearing Corp. v. United States*, 17 CIT 1149, 1153–55, 835 F. Supp. 646, 650 (1993). The Court concludes Commerce adequately explained its decision to cross levels of trade, as it used language virtually identical to that upheld in *NTN*, 19 CIT at ____, 905 F. Supp. at 1092–93. *Compare Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 Fed. Reg. 39,729, 39,767–68 (July 26, 1993) ("*AFBs III*") *with Final Results*, 60 Fed. Reg. at 10,940. In particular, Commerce noted the following: "[W]hen we were unable to compare NTN's U.S. sales to [home market] sales at the same level of trade, we attempted to find matches at the next most similar level of trade." *Final Results*, 60 Fed. Reg. at 10,940.

The Court further concludes Commerce properly considered commercial value in selecting sales for comparison. In matching U.S. and home market models in this case, Commerce applied its twenty percent cost test, using the CV of the U.S. model as the basis for FMV where "the difference between the variable manufacturing costs of the U.S. and home market models exceeded 20 percent of the total manufacturing cost of the U.S. model." *NTN Preliminary Analysis Memorandum*, P.R. Doc. No. 309, Fiche 135, Frame 33 (Feb. 24, 1994). As this Court determined in *NTN*, Commerce's twenty percent cost test appropriately con-

siders commercial value for matching purposes. *See NTN*, 19 CIT at ____, 905 F. Supp. at 1092.

b. *Denial of Level of Trade Adjustment:*

When Commerce compares sales at differing levels of trade, it is authorized to make a COS adjustment to FMV. *See* 19 U.S.C. § 1677b(a)(4)(B). Pursuant to the implementing regulation, 19 C.F.R. § 353.56(a)(1), Commerce may make such an adjustment for a *bona fide* difference in the circumstances of the sales compared. To ensure respondents do not have an incentive to destroy or fail to produce information supporting or rebutting their own assertions, the party claiming such an adjustment has the burden of substantiating its claim. *Timken Co. v. United States*, 11 CIT 786, 804, 673 F. Supp. 495, 513 (1987). In this case, NTN produced several documents allegedly supporting its claim for a level of trade adjustment. Nevertheless, Commerce concluded that "NTN * * * failed to demonstrate what portion, if any, of those price differences [between merchandise sold at different levels of trade] is attributable to differences in levels of trade," as opposed to other factors. *Final Results*, 60 Fed. Reg. 10,940.

NTN argues Commerce erred in denying NTN a level of trade adjustment to FMV to compensate for the different prices at each level of trade and requests a remand for Commerce to explain its conclusion. NTN's Mem. Supp. Mot. J. Agency R. at 18–23.

Commerce responds that the information NTN provided failed to adequately quantify the portion of the price differences attributable to differences in the levels of trade, and so, NTN did not demonstrate that it was entitled to a level of trade adjustment. Def.'s Partial Opp'n to Mots. J. Agency R. at 63–69. Torrington agrees generally with the position taken by Commerce. Torrington's Opp'n to Mots. J. Agency R. at 67–69.

Despite Commerce's somewhat conclusory statement in the Final Results, upon inspection of the record, it is clear to this Court that NTN failed to substantiate its claim for a level of trade adjustment to FMV. As Commerce and Torrington point out in their briefs, NTN could have shown that the price differentials it indicated were due to selling expenses attributable directly to differences in the levels of trade, as opposed to differences in, for instance, quantities sold, arbitrary pricing practices, credit costs, freight, packing or other factors. *See* Def.'s Partial Opp'n to Mots. J. Agency R. at 66; Torrington's Opp'n to Mots. J. Agency R. at 68. The information NTN submitted, however, merely indicated variances in prices and selling expenses at the different levels of trade, without illustrating the factors to which they were attributable. *See, e.g.*, *NTN's Section A Questionnaire Response*, C.R. Doc. No. 5, Def.'s App., Ex. 21 (Aug. 10, 1993) (reporting percentage differences in prices depending on the level of trade at which merchandise was sold).

NTN argues that Commerce has not indicated what proof would suffice for a level of trade adjustment. However, in *American Permac, Inc. v. United States*, 12 CIT 1134, 1138, 703 F. Supp. 97, 101 (1988), upon which NTN relies, the Court held that respondent's detailed sales infor-

mation regarding U.S. sales and a third market sale, as well as a detailed accounting study of expenses for home market sales where such information did not exist, was enough to support the respondent's claim. As indicated above, NTN did not provide such necessary information in this case. *See also NTN*, 19 CIT at ____, 905 F. Supp. at 1093–94 (denying level of trade adjustment claim based on similar information).

Consequently, Commerce's decision to deny NTN's claimed level of trade adjustment was supported by evidence on the record and fully in accordance with law.

c. *Reallocation of NTN's Selling Expenses Without Regard to Level of Trade and Denial of a Level of Trade Adjustment Based on Indirect Selling Expenses:*

NTN argues Commerce improperly denied NTN's request for a level of trade adjustment based on differences in selling expenses despite evidence demonstrating that sales made at different levels of trade incurred different selling expenses. NTN acknowledges that the Court decided this same issue in a challenge to the third review, *see NTN*, 19 CIT at ____, 905 F. Supp. at 1094–95, but maintains the facts on this record provide greater support for its position. NTN's Mem. Supp. Mot. J. Agency R. at 21–23.

After a thorough review of the record, the Court concludes that the facts in this case are substantially the same as those in the third review. The evidence on the record does not establish differences in selling expenses at the three levels of trade because NTN's allocation methodology again does not reasonably quantify the expenses incurred at each level of trade. Commerce explained the following in the Final Results:

> [NTN's and NTN-Germany's] expenses are fixed period costs that do not vary according to sales value or the number of employees who allegedly sell each type of merchandise. Further, * * * NTN's and NTN-Germany's allocations according to levels of trade [are] misplaced because the types of expenses that they allocated are indirect selling expenses that typically relate to all sales.

60 Fed. Reg. at 10,940. Hence, the Court finds no reason to depart from its decision in *NTN*, 19 CIT at ____, 905 F. Supp. at 1094–95. Commerce properly denied NTN's request for a level of trade adjustment based on differences in selling prices at the three levels of trade.

10. *Exclusion of Certain NTN Home Market Sales to Related Parties:*

Under the relevant statute, Commerce may base FMV on the price paid by a related party. *See* 19 U.S.C. § 1677b(a)(3). However, Commerce usually excludes related party sales unless a respondent demonstrates to Commerce's satisfaction that a related party price is an arm's-length price, *i.e.*, that the related party prices are "comparable" to unrelated party prices. *See NTN*, 19 CIT at ____, 905 F. Supp. at 1099 (citing 19 C.F.R. § 353.45(a)); *see also NEC Home Elecs., Ltd. v. United States*, 18 CIT 336, 338–39 (1994), *aff'd in part and rev'd in part*, 54 F.3d 736, 744 (Fed. Cir. 1995).

In this case, NTN reported both related and unrelated sales, admitting that prices for two classes or kinds of related sales, ball and cylindrical roller bearings, were lower than unrelated party prices while related party prices of spherical roller bearings were actually higher than unrelated party prices. *See Final Results*, 60 Fed. Reg. at 10,946–47. Commerce developed a weighted-average percent difference in pricing for each class or kind of merchandise and discarded sales to related parties where the related party average price was lower than unrelated party price. *See id.*

NTN challenges Commerce's methodology, arguing that Commerce failed to provide an objective basis for determining when prices are comparable and that Commerce should have used other factors in determining whether to use sales to related parties when calculating FMV. NTN further contends, with the aid of a hypothetical example, that Commerce should not have used weighted-average prices in determining comparability. NTN's Mem. Supp. Mot. J. Agency R. at 23–26.

Under the applicable statute, Commerce is allowed considerable discretion in deciding whether to include related party sales when calculating FMV. *Usinor Sacilor v. United States*, 18 CIT 1155, 1158, 872 F. Supp. 1000, 1004 (1994). For instance, in *NTN*, 19 CIT at ____, 905 F. Supp. at 1100, this Court upheld Commerce's arms'–length test, emphasizing that respondents failed to present "record evidence tending to show that * * * Commerce's test was unreasonable." In this case, NTN has merely restated its position and has not presented any evidence that would require a different conclusion.

This Court has also rejected the contention that Commerce should consider other factors (*i.e.*, factors other than price) in determining comparability and finds no reason to depart from its stated position. *See NTN*, 19 CIT at ____, 905 F. Supp. at 1100. In addition, NTN's hypothetical example supporting its claim that Commerce should not have used weighted-average prices in determining comparability fails to prove that Commerce's test is unreasonable, as it does not constitute record evidence demonstrating that its related party prices were comparable to its unrelated party prices.

The Court therefore concludes that Commerce's methodology, including its decision to use weighted averages, is within its discretion and Commerce need not consider other factors. *See id.*

11. *NTN's Imputed Interest Expense Allocation:*

NTN claims that Commerce improperly denied NTN's claimed offset for interest expenses incurred in financing cash deposits of estimated antidumping duties. NTN's Mem. Supp. Mot. J. Agency R. at 26–30. Commerce consents to a remand to conform this issue with the remand redetermination pursuant to *Federal-Mogul Corp. v. United States*, 20 CIT, ____, ____, 918 F. Supp. 386, 412–13 (1996). Def.'s Partial Opp'n to Mots. J. Agency R. at 79–80.

Torrington, however, maintains that Commerce properly rejected NTN's claimed adjustment. Torrington's Opp'n to Mots. J. Agency R. at 74–77.

In the remand results to the third administrative review, Commerce determined, and the Court agreed, that it had properly allowed NTN's imputed interest expense adjustment because the expense could not be categorized as a selling expense. *See Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1182–83. In light of *Federal-Mogul*, this issue is remanded to Commerce to allow NTN's adjustment for interest expenses on antidumping duty cash deposits.

12. *Reallocation of NTN's U.S. Selling Expenses Based on the Sale Price to the First Unrelated Purchaser:*

In prior reviews, Commerce accepted NTN's reported U.S. selling expenses allocated on the basis of the transfer prices between NTN-Germany and NTN Bearing Corporation of America. *See, e.g., AFBs III*, 58 Fed. Reg. at 39,749 (third review final results). Nevertheless, in this review, Commerce chose to reallocate the expenses using the resale prices to the first unrelated purchasers. *See Final Results*, 60 Fed. Reg. at 10,919.

NTN claims Commerce inexplicably deviated from its previous methodology in reallocating the expenses, contrary to the principles articulated in *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 795 F. Supp. 417 (1992). NTN further alleges Commerce's reallocation yields less accurate results than the previous methodology. NTN's Mem. Supp. Mot. J. Agency R. at 30–31.

To sustain Commerce's choice of methodology, the Court must determine whether the methodology is reasonable, and not whether it is the only reasonable one, or even the one that the Court finds most reasonable. *See Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *see also NTN*, 19 CIT at ____, 905 F. Supp. at 1100 (stating the Court will uphold the test that Commerce selects to measure whether sales to related parties were made at arms'–length unless that test is shown to be unreasonable). In this case, Commerce allocated expenses using resale prices to unrelated parties, noting that such a methodology provides a value that is not subject to potential manipulation by respondents. *See Final Results*, 60 Fed. Reg. at 10,919. Based on this rationale, and despite the fact that Commerce had previously used a different methodology, the Court concludes that Commerce's new methodology is reasonable.

First, the present situation is distinguishable from *Shikoku*. The *Shikoku* court decided that the methodology Commerce used in the investigation and four administrative reviews had become the law of the proceeding, and so, Commerce could not deviate from that methodology. 16 CIT at 387, 795 F. Supp. at 422. The court emphasized record evidence that plaintiffs adjusted their prices in accordance with the methodology Commerce had consistently applied in the investigation and

previous four reviews. *Id.* As this Court recently stated in rejecting a similar argument from NTN, "[i]mportantly, in *Shikoku*, plaintiffs established their reliance on Commerce's previous methodology consistently applied in several reviews." *NTN*, 19 CIT at ____, 905 F. Supp. at 1095; *see also Koyo Seiko Co. v. United States*, 20 CIT ____, ____, 936 F. Supp. 1040, 1044 (1996).

The Court is disturbed that Commerce would change its consistent methodology in this review, especially after rejecting, as mere speculation, Torrington's argument that the prices were subject to manipulation. *See* 60 Fed. Reg. at 10,919. Nevertheless, Commerce's methodology is reasonable and NTN has not demonstrated any detrimental reliance, such as that in *Shikoku*, on Commerce's previous methodology. Further, NTN failed in any way to support its contention that Commerce's reallocation yields less accurate results than the previous methodology.

Consequently, Commerce's decision in this case to reallocate NTN's selling expenses based on the sales price to the first unrelated purchaser is reasonable.

13. *Adjustments to NTN's COP and CV:*

During the review, Commerce submitted to NTN a supplemental questionnaire requesting NTN to provide, among other things, a detailed description and an example of the sample calculations presented in NTN's original questionnaire exhibit for standard costs. At verification, NTN presented a business proprietary worksheet listing actual costs by product line in one of its plants that Commerce subsequently determined was inconsistent with NTN's prior representations. According to Commerce, the worksheet demonstrated that NTN had overstated the standard costs of non-scope merchandise, and so, had understated the standard costs of scope merchandise. Commerce therefore adjusted NTN's reported COP and CV. *See Final Results*, 60 Fed. Reg. at 10,928–29.

NTN claims the adjustment was not warranted for several reasons: (1) the basis for the adjustment was a worksheet that was not a regularly maintained business record and that concerned actual costs *prior* to the review for one plant, with an insignificant portion of the plant's production forming the basis of the adjustment; (2) Commerce drew erroneous conclusions about revisions in standard costs for subject and non-subject merchandise; and (3) Commerce did not have a legal basis to resort to BIA. *See* NTN's Mem. Supp. Mot. J. Agency R. at 32–40. NTN further alleges that, assuming the adjustment was warranted, Commerce's methodology for calculating the adjustment is less accurate than a methodology that could have been employed. *Id.* at 42–43.

Commerce responds that all of NTN's claims are without merit. While Commerce admits that the worksheet in question was not a regular business document, it insists that NTN did not offer Commerce such a document that could have been used to test NTN's standard costs. Further, while the worksheet information was based on costs prior to the

period of review, Commerce notes that standard costs are based on historical information that is occasionally updated. In addition, Commerce states that, although it inadvertently typed an incorrect date on the worksheet, it did not misunderstand the temporal origin of the information used to test the standard costs. Commerce further maintains that it did not resort to BIA but, rather, used the information contained in the record to calculate the most accurate dumping margin possible. Finally, Commerce argues that it is not required to address NTN's proposed methodology, as Commerce has been granted discretion to devise methodology for the administration of the antidumping law. Def.'s Partial Opp'n to Mots. J. Agency R. at 84–94.

Torrington agrees generally with the position taken by Commerce, but contends Commerce properly resorted to BIA because NTN failed to provide accurate cost information. Torrington's Opp'n to Mots. J. Agency R. at 81–86.

As a preliminary matter, while the worksheet NTN submitted to Commerce was not a regularly maintained business document, NTN did not offer such a document in its response to the supplemental questionnaire. Hence, Commerce properly utilized the document. Further, as verification is a spot check, Commerce was justified in conducting its COP and CV verification at only one of NTN's plants. *See, e.g., Monsanto Co. v. United States*, 12 CIT 937, 944, 698 F. Supp. 275, 281 (1988) ("Verification is a spot check and is not intended to be an exhaustive examination of the respondent's business. ITA has considerable latitude in picking and choosing which items it will examine in detail.").

To determine whether Commerce acted properly in adjusting NTN's COP and CV, the Court must first decide whether Commerce's adjustment amounted to the use of BIA and, if so, whether Commerce was justified in resorting to BIA. Using NTN's verification worksheet, Commerce concluded that NTN's non-subject standard costs were overstated when compared to actual costs because NTN's application of a non-product-specific plant-wide variance to all products shifted costs between products. *See Final Results*, 60 Fed. Reg. at 10,928. Hence, Commerce increased COP and CV (*i.e.*, it made an across the board adjustment to *all* of NTN's costs at *all* plants) to account for the difference it found between the application of the variance to standard costs of a sample non-subject product and the actual costs for the product line.

Commerce claims that it did not resort to BIA in making this adjustment but, rather, utilized information on the record to "correct," as opposed to reject, NTN's data. Nevertheless, Commerce made the adjustments only after determining that NTN's reported information was inaccurate by relying on pre-period of review actual cost information from one plant that it believed demonstrated NTN had understated its COP and CV. Hence, Commerce's adjustments were not merely the correction of a computation or other such error but, rather, clearly amounted to the use of the best information Commerce believed it had

available to determine the proper dumping margins after disregarding NTN's reported data.

The relevant statute requires Commerce to resort to BIA when it cannot verify the accuracy of a respondent's data, when a respondent refuses or is unable to provide information Commerce requests in a timely manner or in the form required, or when a respondent otherwise significantly impedes an investigation. *See* 19 U.S.C. §§ 1677e(b) & (c) (1994). In this case, NTN was able to, and did, fully comply with Commerce's requests for information. While Torrington asserts Commerce was unable to verify the accuracy of the information NTN submitted, the record is devoid of any such allegation by Commerce. Rather, it is clear that Commerce based its action on its disagreement with the method NTN used to calculate its standard costs, and not the accuracy of the underlying data NTN had provided.

This situation is similar to that in *NTN Bearing Corp. v. United States*, 17 CIT 713, 718–20, 826 F. Supp. 1435, 1140–41 (1993), where Commerce made an adjustment based on information from one plant and applied it to all COP and CV for all merchandise. The NTN Court concluded Commerce improperly resorted to BIA, noting Commerce "did not disregard all the information provided by NTN, nor did it question the accuracy of the remaining data. Instead, it questioned the possible distorting effect on overall accuracy the * * * data might have." *Id.* at 718–19, 826 F. Supp. at 1140.

Consequently, in this case, Commerce had no grounds to resort to BIA and Commerce's attempt to mask its use of BIA by explaining that it used the worksheet information to correct NTN's reported COP and CV is an improper *post hoc* rationalization for adjusting the costs. *See, e.g.*, *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (stating respondent's litigation-driven argument came too late for serious consideration).[8] Because Commerce's decision to resort to BIA was unwarranted and improper, this issue is remanded for Commerce to recalculate NTN's COP and CV without resorting to BIA. Having decided that Commerce improperly resorted to BIA, it is not necessary to determine whether Commerce's methodology was reasonable.

14. *Resorting to BIA When NPB Failed to Report Negative Billing Adjustments:*

In response to Commerce's questionnaire requests for NPB's billing adjustments, NPB first stated that it had no such adjustments during the review period, then responded that it did not report its adjustments because of their small magnitude and NPB's inability to associate them with specific sales transactions, *i.e.*, NPB could not trace the transactions in an invoice-specific manner. *See NPB's Questionnaire Response*,

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[8] In addition to Commerce's improper use of BIA, it appears that the adjustment was based on several erroneous assumptions regarding the worksheet data. For instance, Commerce originally believed that the actual cost information in the NTN worksheet was within the period of review when, in fact, it was not. *See NTN COP/CV Verification Report*, C.R. Doc. No. 157, Def.'s App., Ex. 33, at 8 n.13 (Feb. 25, 1994). Further, Commerce's conclusion that the majority of standard costs that remained unchanged were for non-subject merchandise, *see Final Results*, 60 Fed. Reg. at 10,928, is unsupported by the record.

P.R. Doc. No. 102, Def.'s App., Ex. 2, at 12 (Sept. 21, 1993); *NPB's Supplemental Questionnaire Response*, P.R. Doc. No. 207, Def.'s App., Ex. 10, at 7 (Dec. 1, 1993). Upon verification, Commerce discovered numerous errors in NPB's responses, including NPB's failure to report home market billing adjustments. *See Final Results*, 60 Fed. Reg. at 10,908. Commerce therefore corrected those errors for which it had sufficient information and applied BIA to those errors for which it had insufficient or missing information. *See id.*

With respect to NPB's unreported billing adjustments, Commerce examined NPB's home market sales information at verification and found that, when the billing adjustments were included, the weighted-average price of certain products increased for some products and decreased for other products. *See NPB Verification Report*, P.R. Doc. No. 333, Def.'s App., Ex. 17, at 4 (March 1, 1994). The only way to determine the true billing adjustment effect on FMV would be to include them, which was not possible because NPB failed to report them. Hence, because of the potential this result had for masking dumping margins, instead of omitting billing adjustments Commerce resorted to BIA, drawing an inference that the unreported information was adverse to NPB.

NPB claims Commerce improperly changed its position from the preceding review by applying BIA to account for NPB's unreported negative billing adjustments. NPB further alleges Commerce, in resorting to BIA, treated other respondents with similar responses differently than NPB in this review. Finally, NPB contends that Commerce should have disregarded the negative billing adjustments because they were insignificant. NPB's Mem. Supp. Mot. J. Agency R. at 4–17.

Commerce responds that its use of BIA was justified because NPB failed to report the billing adjustment information requested in the questionnaires. Further, Commerce maintains there were compelling reasons not to resort to BIA for other respondents. Finally, Commerce notes that, although it may disregard insignificant adjustments, there is no indication what effect NPB's unreported billing adjustments would have and, further, NPB's own report at verification indicates the effect on certain AFB models may be above the regulatorily defined level for insignificance. Def.'s Partial Opp'n to Mots. J. Agency R. at 94–102. Torrington agrees generally with Commerce's position. Torrington's Opp'n to Mots. J. Agency R. at 91–96.

As a preliminary matter, Commerce may alter its policies depending on a change in circumstances in different reviews. *See, e.g., Allied Aerospace Co. v. United States*, 28 F.3d 1188, 1191 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1077 (1995) (stating the particular methodology Commerce employed in previous investigations "did not rise to the level of an agency regulation having the force and effect of law"). Although NPB claims Commerce disregarded billing adjustments in a previous review, Commerce found that disregarding the missing billing adjustments in this case might disguise dumping and reward NPB for failing to report the adjustments. Indeed, Commerce did not change its report-

ing requirements and NPB admits that it "*chose* not to report negative home market billing adjustments."[9] *See* NPB's Mem. Supp. Mot. J. Agency R. at 4 (emphasis added). Commerce was therefore justified in changing its policy and deciding not to disregard NPB's adjustments.

Further, this case is distinguishable from *Shikoku*, 16 CIT at 387–88, 795 F. Supp. at 421–22, where Commerce had an established practice over several reviews. In this case, Commerce's disregard of reported negative billing information was not an established practice NPB could rely upon in deciding not to comply with Commerce's questionnaire requests. Also, NPB undeniably knew it was requested, if not expected, to report billing adjustments.

Despite NPB's contention that its billing adjustments would only decrease FMV and, therefore, would be only detrimental to NPB, Commerce's weighted-average results at verification clearly indicated otherwise. The Court agrees that Commerce's verification of the respondents that NPB refers to indicated that disregarding the unreported billing adjustments was detrimental to the respondents, as the adjustments solely represented decreases to FMV.

In addition, NPB admits it failed to provide the negative billing information Commerce requested in its questionnaire. In circumstances such as this case, where a respondent refuses to produce information requested in a timely manner, Commerce is to resort to BIA. *See* 19 U.S.C. § 1677e(c).

Finally, under 19 C.F.R. § 353.59(a) (1994), it is within Commerce's discretion to determine whether an adjustment is insignificant and should, therefore, be disregarded. In this case, the Court agrees that the effect that NPB's unreported billing adjustments would have is at least unclear, as they were not reported.

Consequently, the Court concludes Commerce properly resorted to BIA when NPB failed to report negative billing adjustments.

15. *Treatment of Honda's Imports:*

During the period of review, Honda purchased AFBs from various Japanese producers, some of which it imported to two subsidiaries in the U.S. In its Final Results, Commerce classified Honda as a reseller after concluding that Honda's suppliers were unaware of the ultimate destination of the merchandise they sold to Honda. 60 Fed. Reg. at 10,951–52. The effect of treating Honda as a reseller was that its transactions with home market suppliers were not treated as the purchase price base of U.S. price for the AFBs Honda exported to the U.S. Rather, these transactions were used in the home market sales database and U.S. price was based on the price Honda charged to its purchasers. Commerce further decided to exclude Honda's AFB imports to its subsid-

[9] NPB insists it fully and accurately responded to Commerce's original questionnaire by responding that it had no negative billing adjustments because the relevant questionnaire instruction required invoice-specific information, which NPB could not trace. NPB's Reply Mem. Supp. Mot. J. Agency R. at 1–6. Assuming NPB could not trace the necessary information in an invoice-specific manner, the Court is nonetheless disturbed that NPB would respond that it had no such adjustments when, in fact, it had 1,210 billing adjustments that it could report in a product-specific manner. *See NPB Verification Report*, P.R. Doc. No. 333, Def.'s App., Ex. 17, at 4.

iaries based on the Roller Chain rule. *Id.* at 10,938; *see supra* at n.6 (explanation of Roller Chain rule).

Torrington claims Commerce erred in its treatment of AFBs imported by Honda, arguing that Commerce should not have treated Honda as a reseller and should not have applied its Roller Chain rule to Honda's imports. First, Torrington alleges Commerce improperly required that Honda's suppliers "had reason to know" whether each transaction of AFB sales to Honda was to be exported to Honda's U.S. subsidiaries. According to Torrington, it is sufficient under 19 U.S.C. § 1677a(b) if the sale was "for exportation," whether or not the foreign producer knew or should have known the ultimate destination of the merchandise. However, because of Commerce's statutorily unjustified high standard of specific knowledge for each transaction, Torrington maintains that Commerce improperly concluded that Honda was a reseller and based purchase price on the prices Honda charged. Torrington's Mem. Supp. Mot. J. Agency R. at 26–39.

Torrington adds that, based on the information in the record, it is evident that Honda's suppliers "should have known" that some or all of their sales to Honda were not destined for the home market. In support of this claim, Torrington points to Honda's substantial manufacturing capacity in the U.S., as reported in its Annual Report, and to the nature of Honda's suppliers, who had ample knowledge of Honda's status as a reseller of their parts. *Id.* at 29–30.

Second, Torrington claims Commerce abused its discretion by applying the Roller Chain rule to exclude sales based on a comparison of entered values with resale prices. In doing so, Torrington argues Commerce relied upon unreliable inter-company prices and compared values at different points in the chain of commerce. *Id.* at 35–38.

Commerce responds that its knowledge test is fully supported by the legislative history to the statute, as well as case law. Commerce further stands by its decision to exclude Honda's imports to its subsidiaries under the Roller Chain rule. Def.'s Partial Opp'n to Mots. J. Agency R. at 102–11. Honda and NTN agree generally with the positions taken by Commerce. Honda's Opp'n to Torrington's Mot. J. Agency R. at 1–32; NTN's Opp'n to Torrington's Mot. J. Agency R. at 8–10. Honda emphasizes that the record clearly indicates its suppliers did not know or have reason to know that particular AFB sales to Honda would ultimately end up in the U.S. Honda's Opp'n to Torrington's Mot. J. Agency R. at 17–20.

a. *Honda as a Reseller:*

Under 19 C.F.R. § 353.2(s) (1994), a reseller is "any person (other than the producer) whose sales [Commerce] uses to calculate foreign market value or U.S. price, including the foreign reseller or exporter." The Court concludes that Commerce's determination that Honda is a reseller is supported by substantial evidence. Section 1677a(b) states purchase price is "the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the

manufacturer or producer of the merchandise *for exportation* to the United States." 19 U.S.C. § 1677a(b) (emphasis added). The legislative history to this section clearly demonstrates that Commerce's knowledge test was anticipated by Congress and is a reasonable interpretation of the statute.

In enacting a new antidumping law as part of the Trade Agreements Act of 1979, Congress modified the definition of purchase price, hence establishing the basis for Commerce's administrative practice of looking to a producer's knowledge in determining whether to use the producer's sales price as the purchase price. Congress stated the following:

> If a producer *knew* that the merchandise was intended for sale to an unrelated purchaser in the United States under terms of sale fixed on or before the date of importation, the producer's sale price to an unrelated middleman will be used as the purchase price.

S. Rep. No. 249, 96th Cong., 1st Sess. 94 (1979) (emphasis added); *see also* H.R. No. 153, 96th Cong., 1st Sess. 411 (1979) ("The definition makes clear that if the producer *knew or had reason to know* the goods were for sale to an unrelated U.S. buyer, * * * the producer's sales price will be used as 'purchase price' * * *.") (Emphasis added). Further, in 1984 Congress explicitly amended Section 1677a(b) to recognize that a reseller's price may be used as purchase price. *See* H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 185 (1984), *reprinted in* U.S.C.A.A.N. 5220, 5302 (adding "a reseller or" to 19 U.S.C. § 1677a(b)). In addition, this Court has previously upheld Commerce's application of the knowledge test. *See Peer Bearing Co. v. United States*, 16 CIT 799, 803–04, 800 F. Supp. 959, 963–64 (1992).

Based on this legislative history and case law precedent, the Court is convinced that Commerce's decision to apply, and its application of, the knowledge test, is reasonable. The Court recognizes that Commerce's application of such a high standard is exploitable by the "perfect" scenario, where a reseller ostensibly "hides" the ultimate destination of its purchases from its foreign suppliers by the manipulation of information it chooses to provide the suppliers. Nevertheless, the Court finds that such a standard is necessary to fulfill the statutory intent that purchase price be based on sales of goods sold abroad with the intent of being exported to the U.S.

In this case, upon careful examination of the record, the Court agrees with Commerce's determination that Honda's suppliers were unaware of the ultimate destination of Honda's specific AFB purchases. While it is unlikely that Honda's suppliers had no knowledge that certain AFBs sold to Honda would ultimately be shipped to the U.S., the suppliers must have knowledge that particular sales are destined for import into the U.S. There is no evidence on the record to suggest such knowledge. Indeed, the record indicates the opposite, especially since all parts sold in the U.S. during the period of review were also at least offered for sale in the home market. *See Honda HM Verification Report*, C.R. Doc. No. 164, Honda's App., Ex. 10, at 4 (March 4, 1994).

Consequently, the Court concludes that Commerce's decision that Honda is a reseller is supported by substantial evidence on the record and is fully in accordance with law.

b. *Roller Chain Rule Application:*

Commerce excluded Honda's imports to its subsidiaries under the Roller Chain rule. *See Final Results*, 60 Fed. Reg. at 10,938. Torrington asserts this exclusion was improper because Commerce relied on unreliable inter-company prices. In particular, Torrington claims Commerce compared actual entered values to the resale prices of the finished products. Torrington's Mem. Supp. Mot. J. Agency R. at 35–38.

Commerce maintains that its use of actual entered values should be upheld because it is even more reasonable than the use of weighted averages, which the Court has found reasonable. Def.'s Partial Opp'n to Mots. J. Agency R. at 107–11.

First, as this Court stated above with respect to the Roller Chain rule, when an imported scope item is further processed and constitutes an insignificant amount of a complete non-scope final product sold to the first unrelated customer in the U.S., Commerce excludes the insignificant import from the coverage of review. *See NSK*, 19 CIT at ____, 896 F. Supp. at 1269–70. In this case, Torrington does not dispute that the record clearly demonstrates that Honda's imports at issue fall within the Roller Chain threshold of one percent, but objects to Commerce's use of actual entered values.

The Court finds Commerce's use of actual entered values reasonable. First, while Congress expressed its intent to employ the Roller Chain rule, it did not provide guidance as to how "insignificant" merchandise should be measured and, therefore, deference should be given to Commerce's practice. Further, in *Federal-Mogul*, 20 CIT at ____, 918 F. Supp. at 411, the Court approved the use of weighted-average entered values. Consequently, it follows that the actual entered values may also properly be used to determine whether an imported product satisfied the one percent threshold of the Roller Chain rule.

The Court therefore concludes that Commerce's use of actual entered values to determine whether the imported product satisfied the one percent threshold of the Roller Chain rule, and Commerce's conclusion that the merchandise at issue satisfied this threshold, are supported by substantial evidence.

16. *Koyo's Allocation of Air Freight Expenses:*

Torrington claims Commerce erred in accepting Koyo's reported air freight expenses because, contrary to Commerce's policy, they were not reported on a transaction-specific basis and were commingled with ocean freight expenses. Torrington's Mem. Supp. Mot. J. Agency R. at 45–48.

Commerce agrees that it improperly accepted Koyo's allocation for air freight expenses and consents to a remand to examine its acceptance of the allocation and, if necessary, to request additional relevant information from Koyo. In particular, Commerce is concerned with the inconsis-

tency between Koyo's supplemental questionnaire response that air freight charges are not incurred as part of specific sales agreements with particular customers and Commerce's finding at verification that, at least in one instance, Koyo was able to tie a specific air shipment to a specific customer. Def.'s Partial Opp'n to Mots. J. Agency R. at 111–14 (*comparing Koyo Supplemental Questionnaire Response*, P.R. Doc. No. 215, Def.'s App., Ex. 11, at 9–11 (Dec. 6, 1993) *with Koyo Sales Verification Report*, P.R. Doc. No. 286, Def.'s App., Ex. 14, at 8 (Jan. 13, 1994)).

Koyo maintains it was incapable of tracing its air freight expenses on either a sale-specific or customer-specific basis. Koyo's Opp'n to Mot. J. Agency R. at 17–22.

Upon review of the record, the Court agrees with Commerce that the inconsistency discovered at verification warrants a remand for Commerce to examine its acceptance of Koyo's allocation of air freight expenses and, if necessary, to request additional relevant information from Koyo.

17. *Koyo's Efficiency Variance:*

Commerce's practice has been to base its cost calculations upon the cost records of the respondent when they are maintained in accordance with the home market's generally accepted accounting principles ("GAAP"). Commerce will, nevertheless, adjust a respondent's reported cost data if it finds that it does not reasonably reflect the cost of producing the merchandise. *See, e.g., Thai Pineapple Pub. Co. v. United States*, 20 CIT ____, ____, 946 F. Supp. 11, 20 (1996) ("Commerce has never stated that foreign GAAP will suffice when it is unreliable. To the contrary, GAAP consistent methodologies are rejected when they do not reflect actual costs.").

In the preliminary results, Commerce determined that the variance had a direct effect on the specific product costs and lowered certain factory overhead costs allocated to the subject merchandise. Commerce therefore concluded that, to recapture these costs, an upward adjustment was necessary to Koyo's fabrication costs. *See Koyo COP/CV Preliminary Analysis Memorandum*, P.R. Doc. No. 322, Def.'s App., Ex. 16, at 1–2 (Feb. 25, 1994). In the Final Results, however, Commerce accepted Koyo's efficiency adjustment, concluding that it more accurately determined the amount of labor costs associated with individual cost centers. *See* 60 Fed. Reg. at 10,927.

Torrington contends Commerce erred in accepting Koyo's efficiency variance used in the calculation of COP since, as Commerce concluded at verification, it distorted the estimated cost of the individual bearing models. Torrington therefore requests a remand for Commerce to recalculate Koyo's margin by eliminating the effect of the questionable variance consistent with Commerce's preliminary results. Torrington's Mem. Supp. Mot. J. Agency R. at 49–52.

Commerce stands by its Final Results conclusion on this issue, noting that it did not confirm at verification that the efficiency variance distorted Koyo's labor costs. Nevertheless, Commerce consents to a re-

mand to explain the basis for its ultimate decision to accept Koyo's efficiency variance without adjustment. Def.'s Partial Opp'n to Mots. J. Agency R. at 114–19.

Koyo objects to a remand for recalculation of its reported costs, maintaining that Commerce properly accepted its reported COP based on the efficiency variance and emphasizing that Torrington's contention is based on erroneous assertions by Commerce's verifier that Commerce rejected in the Final Results. Koyo's Opp'n to Torrington's Mot. J. Agency R. at 22–40.

After inspection of the record, the Court agrees that Commerce's explanation of its change in position regarding Koyo's efficiency variance was limited, and so, remands this issue to Commerce for a further explanation of its decision.

18. *Refusal of COS Adjustment for NTN's Reimbursement to its U.S. Subsidiary*:

During the review, NTN reported certain expenses as commission payments to its U.S. subsidiary for reimbursement of expenses the subsidiary incurred with respect to sales to a specific purchase price customer. Commerce concluded that these expenses were intra-company transfer payments and treated them as indirect selling expenses. In particular, because true commissions had been paid on home market sales, Commerce adjusted FMV for these indirect selling expenses pursuant to the "commission offset," 19 C.F.R. § 353.56(b)(1). *See Final Results*, 60 Fed. Reg. at 10,915.

Torrington claims Commerce should have examined NTN's reported commissions to determine whether they were comparable to an arm's-length rate and then made a COS adjustment pursuant to 19 U.S.C. § 1677b(a)(4)(B) and 19 C.F.R. § 353.56(a). According to Torrington, pursuant to the CAFC's decision in *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 459 (Fed. Cir. 1990), Commerce adopted a practice of allowing a COS adjustment to FMV for commissions paid to related parties when there is adequate evidence supporting a finding that the commissions were at arm's-length rates and the commissions were directly related to sales. Torrington's Mem. Supp. Mot. J. Agency R. at 52–56.

Commerce responds that the record clearly demonstrates NTN's reported commissions were not true commissions, but typical indirect selling expenses. Commerce therefore maintains its decision to treat them as indirect selling expenses, as opposed to making a COS adjustment, was supported by substantial evidence. Def.'s Partial Opp'n to Mots. J. Agency R. at 119–23.

NTN claims this Court recently addressed this issue in *Federal-Mogul*, 20 CIT at ____, 918 F. Supp. at 413–14, where the Court stated that *LMI-La Metalli* does not impose a duty on Commerce to investi-gate commissions to determine whether they were based on arms'–length transactions but, rather, focuses on Commerce's duty not to ignore evidence on the record regarding whether commissions were based on

arms'–length transactions. NTN contends that because there was no record evidence that it's reported commissions were based on arm's length transactions, Torrington's argument must be rejected. NTN's Opp'n to Torrington's Mot. J. Agency R. at 12.

Upon careful review of NTN's questionnaire and supplemental questionnaire responses, the Court agrees with Commerce that the record clearly demonstrates NTN's reported commissions were not true commissions. In *LMI-La Metalli*, 912 F.2d at 459, the expenses at issue were, by agreement with a sales agent, a percentage of the sales by the agent. In contrast, the expenses at issue here were typical indirect selling expenses that do not vary with the quantity of merchandise sold. *See NTN Response to Section B Questionnaire*, C.R. Doc. No. 16, Def.'s App, Ex. 22, at 19, worksheet #4 (Sept. 21, 1993); *NTN Response to Supplemental Questionnaire*, C.R. Doc. No. 95, Def.'s App., Ex. 28, at 7 (Dec. 8, 1993). Furthermore, deductions for differences in COS have been limited to direct selling expenses, which vary with the quantity sold. *See, e.g., Zenith Elecs. Corp. v. United States*, 77 F.3d 426, 431 (Fed. Cir. 1996). Hence, NTN's indirect expenses at issue here would not qualify for a COS adjustment, as Torrington suggests.

Consequently, Torrington's discussion of cases involving true commissions are irrelevant and Commerce properly treated NTN's reported commissions.

19. *Acceptance of NTN's and NSK's Levels of Trade:*

Torrington claims Commerce erred in improperly shifting the burden of proof to the petitioner to disprove a respondent's reported levels of trade, hence creating an irrebuttable pre-sumption, and in accepting NTN's and NSK's customer classifications without substantial supporting evidence on the record. Torrington further alleges Commerce ignored evidence rebutting NTN's and NSK's customer classifications. Torrington's Mem. Supp. Mot. J. Agency R. at 57–64.

Commerce responds that, according to its practice through the functional test, it properly established an economic presumption that NTN's and NSK's reported customer classifications existed after verifying the respondents' information. Commerce therefore claims the burden of proof properly lies with the party attempting to rebut the economic presumption. Commerce further responds it did not ignore record evidence rebutting NTN's and NSK's reported classifications but, rather, adhered to its practice of establishing an economic presumption based on verified functional information supplied by the respondents. Def.'s Partial Opp'n to Mots. J. Agency R. at 123–35.

NTN and NSK agree generally with the position taken by Commerce. NTN's Opp'n to Torrington's Mot. J. Agency R. at 13–17; NSK's Opp'n to Torrington's Mot. J. Agency R. at 4–11.

Under its regulations, Commerce normally calculates FMV and U.S. price based on sales at the same commercial level of trade. *See* 19 C.F.R. § 353.58. In the Final Results, Commerce accepted NTN's and NSK's reported level of trade classifications. 60 Fed. Reg. at 10,940–41. The

Court recently addressed and sustained Commerce's practice of determining a respondent's levels of trade. In *Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1186, the Court stated that, once Commerce's functional test is satisfied and an economic presumption is created regarding a respondent's reported levels of trade, it is proper to require the party *opposing* a respondent's classifications to provide a factual basis for rebutting the economic presumption by demonstrating that prices and selling expenses are not correlated to levels of trade. *See also Laclede Steel Co. v. United States*, 18 CIT at 965, 977 (1994) (discussing the establishment of an economic presumption through Commerce's functional test and the process of rebutting that presumption). In this case, Torrington has failed to provide such a factual basis.

Torrington claims Commerce improperly accepted NTN's three reported levels of trade without analyzing NTN's selling expenses and improperly accepted NTN's collapse of four categories of customers into two levels of trade. According to its court-approved practice, Commerce performed its functional test on NTN's reported information and concluded that the evidence supported accepting NTN's and NSK's reported levels of trade. *See Final Results*, 60 Fed. Reg. at 10,940–41 (referring to *NTN Section C Questionnaire Response*, C.R. Doc. Nos. 25 & 28, Def.'s Exs. 24 & 25, at 5–6, 12–13 (Sept. 28, 1993)).[10] However, Torrington failed to rebut this economic presumption because it did not present a factual basis demonstrating that there was no correlation between prices, selling expenses and levels of trade.[11]

Consequently, Commerce properly employed its practice of determining NTN's and NSK's levels of trade through the functional test and requiring Torrington to rebut the economic presumption established by the functional test. The Court further agrees Torrington failed to present a factual basis for making such a rebuttal.

20. *Clerical Errors:*

a. *Affecting Koyo:*

(1) *U.S. Doubtful Debt*

During the review, Commerce removed Koyo's doubtful debt expense from Koyo's reported home market selling expenses, but not from Koyo's U.S. selling expenses because it could not locate any record information quantifying the U.S. doubtful debt. *Final Results*, 60 Fed. Reg. at 10,917. Koyo claims that Commerce's treatment of this expense was due to an oversight of a relevant Koyo exhibit and requests a remand. Koyo's Mem. Supp. Mot. J. Agency R. at 24–25.

Commerce agrees that Koyo has noted information that quantifies Koyo's U.S. doubtful debt and consents to a remand to correct this error.

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[10] Torrington claims Commerce's treatment of NTN was inconsistent with its treatment of Nankai Seiko Co., Ltd. ("Nankai Seiko"). Torrington's Mem. Supp. Mot. J. Agency R. at 58. However, unlike NTN, Nankai Seiko failed to establish functional differences among the claimed levels of trade. Hence, because Nankai Seiko failed to satisfy the functional test, there was no economic presumption attached to its customer categories.

[11] Torrington's claim that NSK somehow received a quantity adjustment it was not otherwise entitled to under 19 C.F.R. § 353.55, *see* Torrington's Mem. Supp. Mot. J. Agency R. at 63–64, is unsupported by the record. Rather, the record indicates quantity was only relevant in Commerce's level of trade analysis for the correlation test.

Def.'s Partial Opp'n to Mots. J. Agency R. at 27–28. Torrington, however, contends Commerce's failure to find the expense amount after examining Koyo's financial statements demonstrates Koyo did not provide adequate information on the record. Torrington's Opp'n to Mots. J. Agency R. at 57–59.

Upon inspection of the record, and in particular Koyo's U.S. Sales Response (*see Koyo U.S. Sales Response*, P.R. Doc. No. 103, Koyo's App., Ex. 8, at B–15), the Court agrees with Koyo and Commerce that Commerce merely overlooked relevant information on the record. The Court therefore remands this issue for Commerce to remove the U.S. doubtful debt amount from Koyo's U.S. selling expenses.

(2) *Non-Scope Merchandise*

Koyo claims the computer program used to calculate Koyo's final dumping margin contained a typographical error improperly preventing the elimination of a sale of non-scope merchandise from the dumping margin calculation. Koyo's Mem. Supp. Mot. J. Agency R. at 25–26.

Commerce agrees the computer program used to calculate Koyo's final dumping margin contained a typographical error and consents to a remand to correct this error. Def.'s Partial Opp'n to Mots. J. Agency R. at 28. Torrington concedes that such a remand may be appropriate. Torrington's Opp'n to Mots. J. Agency R. at 59.

Upon inspection, the Court concludes that a typographical error indeed existed in the computer program used to calculate Koyo's final dumping margin and remands this issue to Commerce to correct this error to allow the elimination of a sale of non-scope merchandise from the dumping margin calculation.

(3) *Calculation of Profit in Further Manufacturing*

Koyo contends Commerce's VAT adjustment calculation had the effect of inflating the profit calculated on U.S. sales of further manufactured merchandise and claims this error would be mooted if Commerce were granted the opportunity to recalculate Koyo's margin using a tax-neutral adjustment methodology. Koyo's Mem. Supp. Mot. J. Agency R. at 26. Commerce agrees this error exists and would be corrected if Commerce were granted the opportunity to recalculate Koyo's margin using a tax-neutral adjustment methodology. Def.'s Partial Opp'n to Mots. J. Agency R. at 28–29.

As this Court decided above that Commerce is to recalculate Koyo's margin using a tax-neutral adjustment methodology upon remand, the error at issue here will be mooted in Commerce's remand results. Hence, there is no need for a remand to address this specific issue.

(4) *Home Market Doubtful Debt*

Torrington alleges, and Commerce agrees, the final computer program used to calculate Koyo's dumping margin did not properly adjust home market indirect selling expenses to eliminate the doubtful debt allowance. Torrington's Mem. Supp. Mot. J. Agency R. at 64; Def.'s Partial Opp'n to Mots. J. Agency R. at 29. Upon review, the Court concludes the

computer program did not properly adjust home market indirect selling expenses to eliminate the doubtful debt allowance and remands this issue to Commerce for correction of the error.

b. *Affecting Nachi:*

Torrington contends, and Commerce agrees, the computer program used to calculate the dumping margin for Nachi did not properly account for certain U.S. transactions. Torrington's Mem. Supp. Mot. J. Agency R. at 64; Def.'s Partial Opp'n Mots. J. Agency R. at 29. Upon inspection of the record, the Court concludes Commerce's program erred in improperly accounting for certain U.S. transactions and remands this issue for Commerce to correct the error.

c. *Affecting NTN:*

Torrington alleges, and Commerce agrees, the computer program used to calculate the dumping margin for NTN contained a clerical error. Torrington's Mem. Supp. Mot. J. Agency R. at 65; Def.'s Partial Opp'n to Mots. J. Agency R. at 29. Upon inspection of the record, the Court concludes Commerce's program indeed contained an error with respect to NTN's dumping margin and remands this issue for Commerce to correct the error.

d. *Affecting NSK:*

Torrington claims the computer program used to calculate the dumping margin for NSK contained two clerical errors that resulted in the calculation of erroneous CV figures and in the use of an incorrect factor. Torrington's Mem. Supp. Mot. J. Agency R. at 65–68. Commerce acknowledges Torrington appears to have identified areas of computer program errors and consents to a remand to address these alleged errors. Def.'s Partial Opp'n to Mots. J. Agency R. at 30.

Upon inspection of the record, the Court concludes Commerce's program may contain errors with respect to NSK's dumping margin and remands this issue for Commerce to identify specific clerical errors, correct the errors it uncovers and otherwise address these alleged errors.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to: (1) apply a tax-neutral VAT methodology; (2) deny the adjustment to FMV for NSK's return rebates and post-sale price adjustments; (3) review the record to (a) determine whether it is possible to remove those portions of Koyo's warranty expenses which relate to non-scope merchandise from the adjustments to FMV or (b) deny the adjustment if such removal cannot be made; (4) deny the adjustment to FMV for NTN's home market discounts at issue; (5) determine whether the NTN billing adjustments not reported on a transaction-specific basis were made solely over in-scope merchandise and, if so, to allow them a direct adjustment to FMV or, if such a determination cannot conclusively be made, to deny them an adjustment to FMV; (6) reopen the record to

allow Koyo to submit documentation showing the nature of the expenses Koyo characterized as non-operating expenses; (7) exclude NSK's zero-priced sample transfers from NSK's U.S. sales database; (8) exclude NTN's sample and other similar transfers from NTN's home market sales database; (9) allow NTN's adjustment for interest expenses on antidumping duty cash deposits; (10) recalculate NTN's COP and CV without resort to best information available; (11) examine the acceptance of Koyo's allocation of air freight expenses and, if necessary, request additional information; (12) explain further the basis for accepting Koyo's efficiency variance without adjustment; and (13) correct clerical errors for Koyo (with respect to U.S. and home market doubtful debt, and failure to eliminate a sale of non-scope merchandise from the dumping margin calculation), Nachi (with respect to improper accounting for certain U.S. transactions), NTN and NSK. Commerce is sustained as to all other issues.

(Slip Op. 97–75)

MARK D. MYERS D/B/A VMC USA, PLAINTIFF *v.*
UNITED STATES, DEFENDANT

Consolidated Court No. 93–07–00421

FARMER'S INVESTMENT GROUP D/B/A
SANTA CRUZ VALLEY PECAN, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–11–00744

Plaintiffs challenge the United States Customs Service's ("Customs") classification of the merchandise at issue under various provisions of Heading 7013 of the Harmonized Tariff Schedule of the United States ("HTSUS") as "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * Other * * * Other * * *" dutiable at rates between 7.2% and 30% *ad valorem*. Plaintiffs contend the merchandise is properly classified under subheading 7010.90.50, HTSUS, as "preserving jars of glass * * * Other containers (with or without their closures)" and therefore should enter the United States free of duty. Defendant maintains the classification of the merchandise is correct and requests this Court sustain Customs' classification.

Held: The Court holds the tariff term "preserving jars of glass" in Heading 7010, HTSUS, is an *eo nomine* provision, holds plaintiffs have overcome the statutory presumption of correctness which attaches to Customs' classification, and holds the merchandise at issue properly is classified under subheading 7010.90.50, HTSUS. Accordingly, the Court will enter judgment for the plaintiffs and order Customs to reliquidate the entries at issue in conformance with this Court's opinion, and issue appropriate refunds with interest as provided for by law.

(Dated June 17, 1997)

O'Donnell, Byrne & Williams, (R. Kevin Williams, Michael A. Johnson) Chicago, IL, for plaintiff Mark D. Myers d/b/a VMC USA.

Barnes, Richardson & Colburn, (Sandra Liss Friedman, Frederic D. Van Arnam, Jr.) New York, NY, for plaintiff Farmer's Investment Group d/b/a Santa Cruz Valley Pecan.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Barbara Silver Williams), Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* Plaintiffs are importers of the subject merchandise, which consists of a glass jar and glass lid, a wire bail and trigger closure mechanism, and a natural rubber gasket. In the course of liquidation, the subject merchandise was classified by the United States Customs Service ("Customs") under various provisions within Heading 7013 of the Harmonized Tariff Schedule of the United States ("HTSUS"), and assessed the scheduled duty rates of between 7.2% and 30% *ad valorem*, depending on the value of the jar or terrine imported.

Plaintiffs contend the merchandise at issue should be classified under Heading 7010, HTSUS, the relevant provisions of which state:[1]

7010	Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass:
7010.90	Other:
7010.90.50	Other containers (with or without their closures) ..... Free

In contrast, the United States contends the merchandise was properly classified and liquidated by Customs under various provisions of Heading 7013, HTSUS, which state:

7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
7013.39	Other:
7013.39.20	Other:
	Valued not over $3 each 30%
7013.39.50	Other:
	Valued over $3 but not over $5 each 15%
7013.39.60	Valued over $5 each 7.2%
	Other glassware:
	Of lead crystal:
7013.91.20	Valued over $1 but not over $3 each 14%
7013.99	Other:
	Other:
7013.99.50	Valued over $0.30 but not over $3 each ... 30%
	Valued over $3 each:
	Other:

[1] The HTSUS provisions cited by the Court appear in HTSUS (4th ed. 1992 & Supp. 1).

7013.99.80	Valued over $3 but not over $5 each ... 15%
7013.99.90	Valued over $5 each ... 7.2%

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988). For the reasons set forth below, the Court holds the tariff term "preserving jars of glass" in Heading 7010, HTSUS, is an *eo nomine* provision, and finds the merchandise at issue is properly classifiable under subheading 7010.90.50, HTSUS. Judgment will therefore be entered for plaintiffs. Plaintiffs' motion for directed judgment, made at the conclusion of the trial conducted before this Court, is subsumed by this opinion.

BACKGROUND

Plaintiff, Mark D. Myers d/b/a VMC USA, imports Le Parfait Super glass jars and terrines manufactured by VMC Grand Public in Riems, France. The subject merchandise specifically includes 200 gram, 350 gram, 500 gram, 750 gram, and 1,000 gram Le Parfait Super glass terrines, and .5 liter, .75 liter, 1 liter, 1.5 liter, 2 liter,[2] and 3 liter Le Parfait Super glass jars. (*See* Mark D. Myers' Am. Compl. at ¶ 7.)

Plaintiff, Farmer's Investment Group d/b/a Santa Cruz Valley Pecan, imports 1 and 1.5 liter glass jars. The imported merchandise is decorated with the motif and name of Country Estate Pecans, a commercial food packer. (*See* Farmer's Investment Group's Compl. at ¶ 4.) The glass jars imported by Farmer's Investment Group are manufactured by Vererle Christallerie D'Arque, which is owned by J.G. Durand & Cie of Arques, France.

CONTENTIONS OF THE PARTIES

A. *Plaintiffs:*

Plaintiffs make two arguments in advancing their contention the subject merchandise should be classified under subheading 7010.90.50, HTSUS. First, plaintiffs maintain the tariff term "preserving jars of glass" is an *eo nomine* provision, citing in support of their argument this Court's decision in *Commercial Aluminum Cookware Co. v. United States*, 938 F. Supp. 875, 883–84 (CIT 1996), as well as the legislative history of Heading 7010, HTSUS.

Plaintiffs argue, in the alternative, even if the Court determines "preserving jars of glass" is a principal use provision, the merchandise at issue is properly classified under subheading 7010.90.50, HTSUS. In support of this argument, plaintiffs maintain an application of the *Carborundum* factors[3] to the evidence presented at trial establishes the

[2] Additionally at issue are 1 and 2 liter Le Parfait Super preserving jars decorated with logos and designs of the Arizona Pistachio Company. (*See* Mark D. Myers' Am. Compl. ¶ 113.)

[3] In *United States v. The Carborundum Company*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976), the Court established five criteria for determining whether an item properly is classified within a principal use tariff provision. The factors are: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchaser; (3) the channels of trade in which the merchandise moves; (4) the environment of sale; and (5) usage, if any, in the same manner as the merchandise which defines the class.

subject merchandise is a class or kind of "preserving jar[ ] of glass" and therefore properly is classified under subheading 7010.90.50, HTSUS.

B. *Defendant:*

In responding to plaintiffs' arguments, the defendant makes three contentions in maintaining Customs' properly classified the subject merchandise under various provisions of Heading 7013, HTSUS. First, defendant asserts the tariff term "preserving jars of glass" is a principal use or *eo nomine* by use provision which should be read as applying to "jars which are used for preserving." (Def.'s Mem. in Supp. of Mot. in Limine at 6.) Defendant asserts the term "preserving jars of glass" cannot be considered an *eo nomine* provision because "there is no commercial understanding of the tariff term 'preserving jars of glass' as a specific, identifiable article." (Def.'s Post-Trial Mem. ("Def.'s Br.") at 1.)

Second, defendant argues under the statute "the term 'preserving jar' is limited to the class or kind of jar principally used in the home for preserving." *(Id.* at 2.) Defendant asserts the provision "jars, * * * and other containers, of glass, of a kind used for the conveyance or packing of goods" in Heading 7010, HTSUS, covers jars used commercially, while the provision for "preserving jars of glass" covers "home preserving only." *(Id.)* In making this argument defendant relies heavily on a report entitled "Complete Guide to Home Canning", prepared by the United States Department of Agriculture ("USDA"), which recommends that jars similar to the subject merchandise not be used for home canning.

Finally, defendant asserts the evidence presented at trial failed to establish the subject merchandise is of the class or kind of merchandise covered by Heading 7010, HTSUS. Defendant maintains "the evidence showed that the jars in issue do not fall within the class or kind of jars principally used in the home" and that "plaintiffs did not show that the jars are principally used commercially in preserving." *(Id.* at 3.)

STANDARD OF REVIEW

Precedent establishes "[t]he ultimate issue as to whether particular imported merchandise has been classified under an appropriate tariff provision * * * entails a two step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994); *see also Universal Electronics Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997) (citing *Intel Singapore, Ltd. v. United States*, 83 F.3d 1416, 1417–18 (Fed. Cir. 1996)). The first step is a question of law; the second, a question of fact. *See, e.g., Universal Electronics Inc.*, 112 F.3d at 491; *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir.1995); *E.M. Chem. v. United States*, 9 Fed.Cir. (T) 33, 35, 920 F.2d 910, 912 (1990).

The statute provides Customs' classification decision is presumed to be correct, and the importer has the burden of proving otherwise. *See* 28 U.S.C. § 2639 (a)(1) (1988). While the statute provides Customs' decision is accorded a presumption of correctness, the presumption "is a

procedural device that is designed to allocate, between the two litigants to a lawsuit, the burden of producing *evidence* in sufficient quantity." *Universal Electronics Inc.*, 112 F.3d at 492. While the presumption of correctness "certainly carries force on any factual components of a classification decision", it "carries no force as to questions of law", which this Court reviews *de novo*. *Id.*; *see also Semperit Industrial Products, Inc. v. United States*, 18 CIT 578, 587, 855 F. Supp. 1292, 1300 (1994) ("[D]eference [to Customs' classification] is logically incompatible with the Court's role in customs classification cases because the standard in these cases requires the Court to reject any interpretation, *however reasonable*, that the Court determines is incorrect.").

The Court reviews Customs' classification decisions *de novo* under 28 U.S.C. § 2640(a)(1) (1988), and is required to reach the correct result. *See* 28 U.S.C. § 2643(b) (1988); *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 78, 733 F.2d 873, 880 (1984) (once plaintiff establishes Customs' classification is incorrect, "it [is] the court's duty to find a correct answer"). In determining whether the importer has overcome the statutory presumption of correctness, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.*, 2 Fed. Cir. (T) at 75, 733 F.2d at 878.

DISCUSSION

After hearing the evidence offered at trial *de novo* and reviewing the papers submitted by the parties, the Court makes the following findings of fact. First, the Court finds the terms "canning jar" and "preserving jar" are synonymous, and that the industry uses the terms interchangeably. The Court notes Dr. Kenneth Hall, Professor of Nutritional Sciences at the University of Connecticut, testified "[f]requently they're [canning jar and preserving jar] used as synonyms." Trial Tr. at 135. Additionally, the testimony of Andrew Liscow, a vice president at Cincinnati Preserving Company, opined "canning jar" and "preserving jar" are synonymous terms. *See id.* at 328. Finally, the Court notes the testimony of Matteo Petrillo, the chief financial officer of J.G. Durand International, states there is no distinction between "canning" jars and "preserving" jars. *See id.* at 68–69. The Court finds the testimony of these three individuals more persuasive than that of Dr. Sher Paul Singh, Associate Professor at the Michigan State University School of Packaging, who testified the term "preserving jar" is not a term used "in connection with jars used commercially to pack and convey food." *Id.* at 365.

Second, the Court finds fundamental differences exist in the physical characteristics of what were referred to as "one-way" or "packing and conveyancing jars" and "preserving jars". The Court finds an examination of the preserving jars reveals they are manufactured so that the glass is noticeably thicker than the packing and conveyancing jars. *See also id.* at 288–89. The thickness of the glass in the preserving jars increases their durability and facilitates their reuse in home canning or

preserving. *See id.* at 92, 287–88. In contrast, packing and conveyancing jars, designed to facilitate the transportation of a product from the manufacturer to the consumer, are manufactured with less glass. *See id.* at 287–88, 408. Additionally, while both the preserving and packing and conveyancing jars can be processed in a manner so that a hermetic seal is formed between the jar and the lid, the Court finds the sale of replacement gaskets for use with the subject merchandise emphasizes the fact that a new hermetic seal can be formed each time the jar is reused for home canning and preserving. In contrast, the packing and conveyancing jars do not have closure mechanisms that would permit their reuse by consumers in home canning and preserving applications. Rather, once the hermetic seal is broken when the jar is opened, there is no means for the consumer to recreate a reliable hermetic seal.

Additionally, the Court finds significant differences exist between the physical characteristics of "storage jars" and "preserving jars". The Court finds unlike packing and conveyancing jars and preserving jars, storage jars are not designed in such a manner that a hermetic seal, which prevents air from entering the head space of the jar, can be formed between the jar and the lid. Storage jars are utilized where hermetic seals are not needed, *i.e.*, for the storage of buttons or nails. Matteo Petrillo testified storage jars manufactured by Durand "are not capable of forming an air tight seal during thermal processing." *Id.* at 65. Similarly, in his testimony Peter Forttrell, a Field National Import Specialist for the United States Customs Service, stated a storage jar is distinguishable from a preserving jar because with storage jars "there's no way to make a tight seal [between the lid and the jar]." *Id.* at 549. Additionally, the Court finds an examination of the jars reveals significant differences in the amount of glass used in manufacturing storage jars and preserving jars. The storage jars, like the packing and conveyancing jars, are manufactured in such a manner that the walls of the jar are noticeably thinner than the preserving jars. *See also id.* at 65, 290–91.

Having made these findings of fact, the Court will now discuss its determinations on the questions of law raised in this matter.

A. *"Preserving Jars of Glass" is an Eo Nomine Tariff Term:*

A central issue confronting the Court is whether the tariff term "preserving jars of glass" in Heading 7010, HTSUS, is an *eo nomine* provision or a principal use provision. Initially, the Court notes an *eo nomine* provision "describes a commodity by a specific name, usually one well known to commerce." *See* Ruth F. Sturm, *Customs Law & Administration* § 53.2 at 2 (Supp. 1995) (citing *United States v. Bruckmann*, 65 C.C.P.A. 90, C.A.D. 1211, 582 F.2d 622, 625 n.8 (1978)). The Court of Customs and Patent Appeals, a predecessor to the United States Court of Appeals for the Federal Circuit, noted:

> The clear weight of the authorities on the subject is that an *eo nomine* statutory designation of an article, without limitations or a shown contrary legislative intent, judicial decision, or administra-

> tive practice to the contrary, and without proof of commercial designation, will include all forms of said article.

Nootka Packing Co. v. United States, 22 C.C.P.A. 464, 470, T.D. 47464 (1935); *see also Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992) ("Tariff terms contained in the statutory language 'are to be construed in accordance with their common and popular meaning, in the absence of contrary legislative intent.'") (citation omitted).

Tariff provisions also classify items based on the use of the class or kind of articles to which the imported merchandise belongs. The Additional U.S. Rules of Interpretation to the HTSUS provide:

> 1. In the absence of special language or context which otherwise requires—
>
> > (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

HTSUS Additional U.S. Rules of Interpretation, 1.(a).

Plaintiffs maintain the term "preserving jars of glass" is an *eo nomine* provision and challenge defendant's arguments, asserting the cases cited by defendant "do not stand for the proposition that *eo nomine* provisions are governed by use, or principal use." (Pls.' Joint Resp. to Def.'s Mot. in Limine at 11.) Plaintiffs assert "[t]o the contrary, it is well founded Customs law that an *eo nomine* provision is one that describes a commodity by a specific name, usually one well known to commerce." *(Id.* at 11–12 (citation omitted).)

Defendant asserts use is controlling in classifying the jars at issue, maintaining "[a] review of long standing judicial precedent, the plain face of the statute, and lexicographical authorities demonstrate that the tariff term 'preserving jars of glass' 7010, HTSUS, is a principle [sic] use provision rather than an *eo nomine* provision." (Def.'s Mem. in Supp. of Mot. in Limine at 3.) Additionally, defendant asserts "even if the term 'preserving jars of glass' is an *eo nomine* provision, it is a provision governed by use." *(Id.* at 3–4 (citing *United States v. Quon Quon Company*, 46 C.C.P.A. 70, C.A.D. 699 (1959).)

While defendant's Motion in Limine cites *United States v. Quon Quon Company*, 46 C.C.P.A. 70, C.A.D. 699 (1959), as standing for the proposition that tariff terms may be characterized as *eo nomine* provisions governed by use, the Court reads this opinion differently. Judge Rich states

> [w]hile unhesitatingly granting the truth of the contention that "baskets" in the tariff act provides for baskets "*eo nomine*," this does not help us in the least to decide whether the imported articles *are* baskets * * *. Of all things most likely to help in the determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, use is of paramount importance. To hold otherwise would logically require the trial court to rule out evidence of what things actually are every

> time the collector thinks an article, as he sees it, is specifically named in the tariff act.

Quon Quon Company, 46 C.C.P.A. at 73. The *Quon Quon Company* opinion supports the proposition "use is an important factor in determining classification though an *eo nomine* designation is involved" and "use cannot be ignored in determining whether an article falls within an eo nomine tariff provision." *Id.* at 72, 73. All Judge Rich's opinion indicates, however, is that use is one of the factors to be considered in determining whether merchandise falls within the scope of an *eo nomine* tariff provision. The Court does not read the *Quon Quon Company* opinion to support the proposition "certain *eo nomine* provisions are in fact governed by use." (Def.'s Mem. in Supp. of Mot. in Limine at 4.) Accordingly, the Court rejects defendant's assertion that the term "preserving jars of glass" is an *eo nomine* by principal use provision.

As for the issue of whether the tariff term "preserving jars of glass" is an *eo nomine* or principal use provision, the Court notes two previous opinions issued by this Court have interpreted the language in Heading 7010, HTSUS. First, in *Group Italglass U.S.A., Inc. v. United States*, 17 CIT 226, 228 (1993), the Court held the provision in Heading 7010, HTSUS, addressing "Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods" is a principal use provision. According to the court "[t]he language in heading 7010 'of a kind used for' explicitly invokes use as a criterion for classification and under heading 7010 principal use is controlling." *Id.*

A second opinion, *Commercial Aluminum Cookware Co. v. United States*, 938 F. Supp. 875, 883 (CIT 1996), held the third clause of Heading 7010, HTSUS, addressing "stoppers, lids and other closures, of glass" is an *eo nomine* provision. In reaching this holding, the Court determined "each listing of items in Heading 7010, HTSUS, separated by semicolons, constitutes a separate class of merchandise" and that the semicolons "create a wall around each grouping of items preventing the qualifying language from one grouping from applying to another." *Commercial Aluminum Cookware Co.*, 938 F. Supp. at 882, 883. Additionally, the *Commercial Aluminum* opinion notes

> [t]here is no language in the statutory provision dictating that the "preserving jars of glass" be limited to those "preserving jars of glass" that are "of a kind used for the conveyance or packing of goods." The only qualification is that the jars be "of glass." * * * If the drafters of the tariff provision meant for the qualifying language in the first class of merchandise to be read throughout the heading, they were perfectly capable of including such language at the end of the heading as is commonly done in other tariff provisions.

Id. at 883 (footnote omitted).

Based on this precedent and the plain language of the tariff term, the Court finds the three clauses encompassed in Heading 7010, HTSUS, are separate independent clauses and the qualifying principal use lan-

guage included in the first clause of Heading 7010, HTSUS, does not apply to the term "preserving jars of glass". Accordingly, the Court holds the tariff term "preserving jars of glass" in Heading 7010, HTSUS, is an *eo nomine* provision.

B. *Scope of the Tariff Term "Preserving Jars of Glass":*

The next issue facing the Court is defining the scope of the tariff term "preserving jars of glass", which is also a question of law reviewed by this Court *de novo*. The General Rules of Interpretation of the HTSUS provide "classification shall be determined according to the terms of the headings and any relative section or chapter notes." HTSUS, Gen.R.Interp. 1. When a tariff term is not clearly defined by either the HTSUS or its legislative history, the meaning of the term is generally resolved by ascertaining its common and commercial meaning. *See, e.g., W.Y. Moberly, Inc. v. United States*, 924 F.2d 232, 235 (Fed. Cir. 1991). In ascertaining common meaning, the court may rely on its own understanding of the term used, and may consult dictionaries, scientific authorities, and other reliable sources of information. *See, e.g., Brookside Veneers, Ltd. v. United States*, 6 Fed.Cir. (T) 121, 125, 847 F.2d 786, 789 (1988).

Finding the term "preserving jar of glass" is not clearly defined by the HTSUS or its legislative history, the Court notes "preserve" is defined as "to can, pickle, or similarly prepare * * * for future use." *Webster's Third New International Dictionary* 1794 (1981). Based upon this definition, a "preserving jar" would appear to be commonly understood to be a jar utilized in the canning of foods. Defendant, however, asserts "the structure of the statute * * * shows that the term 'preserving jar' is limited to the class or kind of jar principally used in the home for preserving. It does not cover jars used in commercial preserving." (Def.'s Br. at 1–2.) Defendant asserts the first clause in Heading 7010, HTSUS, addressing jars "used for the conveyance or packing of goods", covers jars used by commercial food packers. Additionally, defendant argues the term "preserving jars of glass", the second clause in Heading 7010, addresses the remaining jars not covered by the provision for jars "used for the conveyance or packing of goods", in this case jars used in home canning. In support of this contention, defendant notes the "Complete Guide to Home Canning", a publication prepared by USDA, recommends against using preserving jars with a wire bail and trigger mechanism for home canning. Defendant asserts, therefore, the jars at issue are in fact not used for home canning, but rather are used by consumers as storage jars.

The Court rejects defendant's interpretation of the statute. Defendant seems to be arguing that because the clause in Heading 7010, HTSUS, addressing jars "used for the conveyance or packing of goods" covers all jars used for commercial purposes, the clause "preserving jars of glass" only describes preserving jars used for home canning. There is no rational basis for one to draw this conclusion from a plain reading of the statute. Furthermore, the evidence in this case clearly demonstrates that preserving jars of glass are used for commercial purposes, as well as

in home canning and preserving applications. The Court interprets the statute to distinguish "packing and conveyance" jars from "preserving" jars based on the physical characteristics of the jars, not, as defendant contends, based on whether the jars are used in the home or commercially. Both packing and conveyance and preserving jars prevent food from decomposing. As the Court noted previously, however, the subject merchandise have certain physical features which differentiate them from packing and conveyance jars. (*See* Trial Tr. at 365.) The three fundamental feature which distinguish "preserving" jars from "packing and conveyance" jars and "storage" jars are: (1) the thickness of the glass in the walls of the jars; (2) the jar's ability to form and maintain a hermetic seal; and (3) the jar's potential for reuse as a canning or preserving jar.

While both packing and conveyance and preserving jars have the ability to form and maintain a hermetic seal, the walls of the preserving jars are thicker and contain more glass. This characteristic strengthens the jar and facilitates its reuse, whereas packing and conveyance jars have thinner walls and are not intended to be reused in home canning or preserving applications. The potential for reusing the subject merchandise is illustrated by the manufacturer's sale of replacement gaskets. In contrast, once the hermetic seal is broken on a "packing and conveyance" jar, there is no means for the consumer to reestablish the hermetic seal.

Storage jars are easily differentiated from preserving jars because they lack all three features of the preserving jars. Storage jars are not manufactured with thick glass walls, they do not have the ability to form a hermetic seal, and therefore are not able to be reused as a preserving jar.

C. *The Merchandise at Issue is Properly Classified as "Preserving Jars of Glass":*

Determining whether the merchandise at issue falls within the tariff provision "preserving jars of glass" is a factual question, and therefore Customs' classification of the subject entries under various provisions of Heading 7013, HTSUS, is entitled to the statutory presumption of correctness. *See Universal Electronics, Inc.*, 112 F.3d at 491–92 (noting "the presumption of correctness applies to the ultimate classification decision").

The Court finds plaintiffs have produced sufficient evidence to overcome the presumption of correctness attaching to Customs' classification. The Court is persuaded the subject merchandise is not properly classified under Heading 7013, HTSUS, by plaintiff's evidence presented on the thickness of the glass in the subject merchandise, the ability of consumers to reuse the subject merchandise for home canning and preserving, and the ability of the subject merchandise to form a vacuum and reduce significantly the exchange of air between the jar's headspace and the outside environment. The Court also finds there are no limitations or contrary legislative intent excluding the imported merchandise from the *eo nomine* designation "preserving jars of glass" in Heading 7010, HTSUS. Accordingly, the Court holds the merchandise at issue is prop-

erly classifiable under subheading 7010.90.50, HTSUS, as "preserving jars of glass".

Finally, the Court notes the language of Heading 7013, HTSUS, which covers certain glassware "(other than that of heading 7010 or 7018)" provides additional support for the Court's determination the plaintiffs have overcome the statutory presumption of correctness. Because plaintiffs have established the merchandise at issue is properly classifiable under subheading 7010.90.50, HTSUS, the merchandise clearly cannot be classified under Heading 7013 because that heading specifically excludes any merchandise properly classified under Heading 7010, HTSUS. *See Commercial Aluminum Cookware Co.*, 938 F. Supp. at 882; *Group Italglass U.S.A., Inc.*, 17 CIT at 227 ("[P]laintiff automatically overcomes the presumption of correctness attaching to Customs' classification under heading 7013.39.20 simply by establishing that its glassware is classifiable under heading 7010.").

CONCLUSION

For the reasons discussed above, the Court finds plaintiffs have overcome the statutory presumption of correctness attached to Customs' classification of the merchandise at issue under various subheadings in Heading 7013, HTSUS. The Court holds the tariff term "preserving jars of glass" is an *eo nomine* provision, and finds the subject merchandise is properly classifiable under subheading 7010.90.50, HTSUS. Accordingly, the subject merchandise is entitled to enter the United States free of duty. The Court orders Customs to reliquidate the entries at issue and refund duties to plaintiff, with interest as provided by law.

SCHEDULE OF CONSOLIDATED CASES

Consolidated Under: *Mark D. Myers d/b/a VMC USA v. United States* Consol. Court No. 93–07–00421.

A.J. Brielmaier Supply Co. v. United States, Court No. 93–07–00420.

A.J. Brielmaier Supply Co. v. United States, Court No. 94–03–00174.

Mark D. Myers d/b/a VMC USA v. United States, Court No. 94–09–00502.

Mark D. Myers d/b/a VMC USA v. United States, Court No. 95–02–00181.

(Slip Op. 97–76)

BRADFORD INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–12–00836

(Decided June 17, 1997)

Lamb & Lerch, Richard J. Kaplan and *David R. Ostheimer,* for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Amy M. Rubin),* United States Customs Service *(Beth C. Brotman),* of Counsel, for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WALLACH, *Judge:* This matter having come on for trial in New York, New York, on the 23rd day of July, 1996, the parties having submitted it for decision and judgment after completion of the trial on the 25th day of July, 1996, the Court having considered the parties' Pre-Trial Briefs submitted on the 8th day of July, 1996, their Post-Trial Briefs submitted on the 28th day of October, 1996, and their Reply Briefs submitted on the 14th day of November, 1996, and having given due consideration to the testimony of two witnesses for Plaintiff, and three witnesses for Defendant, together with due consideration of all stipulated facts and all evidence admitted at trial, the Court, pursuant to USCIT Rule 52(a) now finds facts and sets forth its conclusions of law, and enters Judgment for Defendant pursuant to these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) This action involves the classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of imitation leather articles[1] imported into the United States by Plaintiff, Bradford Industries, Inc. These products are known by their trade names "Temasoft" and "Forsoft".[2]

2) The imported products were classified by the United States Customs Service ("Customs") under HTSUS subheading 5603.00.90.

3) Plaintiff contends that the products should have been classified under HTSUS subheading 3921.13.11. All classifications were properly protested and all liquidated duties were paid.

4) The imported merchandise consists of two components: a polyurethane component and a nonwoven textile component. The back of the imported merchandise is "buffed" prior to importation.

5) Both of Plaintiff's witnesses and two of Defendant's witnesses agreed that after the buffing process the fibers of the nonwoven are not "completely embedded".

6) Mr. Veiga, Plaintiff's witness, testified that after the subject merchandise undergoes the buffing process prior to importation, the prod-

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[1] Despite contrary testimony, the parties stipulated that the subject merchandise is an imitation leather article. Plaintiff's Statement Of Material Facts As To Which There Exists No Triable Issue Of Fact at ¶ 8 and Defendant's Response at ¶ 8.

[2] Plaintiff's witness, Mr. Grounauer, testified at trial that Temasoft's characteristics are substantially identical to those of Forsoft. Consequently, the Court will treat these products as being identical.

uct is no longer entirely coated or covered with polyurethane. The Court finds Mr. Veiga's testimony on this point, coupled with the testimony of Mr. Lutzer, Defendant's witness, who stated that he could see "free-standing fibers" on the buffed surface of the subject merchandise, to be credible.

7) In addition to serving as a reinforcement to the polyurethane component, the nonwoven is used as a "carrier" for the polyurethane. Further, it provides the final product with the desired "dimension, stability, and the physical characteristics" lacking from the polyurethane by itself. It also contributes to the stretch ability of the product. The nonwoven also improves the final product's ability to adhere to another substance. Mr. Holliday, Defendant's witness, testified that the nonwoven portion found in imitation leather contribute a variety of properties to that product, including aesthetics or appearance, printability, wick ability, feel, ability to contain crease, roll, ability to be bonded with heat or adhesives, ability to hold a stitch, and abrasion resistance. The Court found this testimony to be credible and not inconsistent with the testimony presented by Plaintiff's witnesses.

8) If any of these Findings of Fact shall more properly be Conclusions of Law they shall be deemed to be so.

CONCLUSIONS OF LAW

1) This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a).

2) Customs' factual determinations are entitled to a presumption of correctness. 28 U.S.C. § 2639(a)(1) (1988); *Goodman Mfg. L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). The burden of proving that Customs' determination is incorrect rests with the party challenging it. 28 U.S.C. § 2639(a)(1).[3]

3) Despite the testimony and other evidence introduced at trial, Plaintiff has failed to meet its burden of demonstrating Customs' determination is incorrect.

4) Customs classifies the merchandise according to its condition when imported. *Amersham Corp. v. United States*, 5 CIT 49, 53, 564 F. Supp. 813, 815 (1983), aff'd, 2 Fed. Cir. (T) 33, 728 F.2d 1453 (1984). In its condition at importation, the nonwoven component of the imitation leather is not completely embedded in the polyurethane or entirely coated or covered with polyurethane.

5) General Rule of Interpretation ("GRI") 1 to the HTSUS provides: "classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." HTSUS Heading 3921, which contains Plaintiff's proposed classification, is found in Chapter 39, Section VII. Chapter Note 2(l) to Chapter 39 excludes from

[3] Plaintiff argues that when Defendant withdrew "the legal theory that classification of a product as a plate, sheet, film, foil and strip, of plastics combined with textile materials under subheading 3921.13.11, HTSUS, requires that the plate, sheet, etc. exist prior to its combination with the textile * * *". Defendant's Letter to Court, dated July 22, 1996, it "abandoned the sole reason and rationale" behind the inapplicability of Note 3(c) to Chapter 56. Plaintiff's Post-Trial Brief at 13–14. Plaintiff, by implication, is claiming that Defendant is not allowed to argue any other theory to support the inapplicability of Note 3(c) to the subject merchandise. As Plaintiff did not cite to any authority for its argument, the Court rejects it.

Chapter 39 "goods of section XI (textiles and textile articles)." Heading 5603, under which Customs classified the subject merchandise, is found in Chapter 56, Section XI. In order to determine whether the subject merchandise is properly classifiable under Chapter 56, thus falling within Section XI and as such excluded from Chapter 39, the exclusions from Chapter 56 contained in Chapter Note 3 must be examined. Note 3 excludes from classification under Heading 5603, in pertinent part:

> (b) Nonwovens, either completely embedded in plastics or rubber, or entirely coated or covered on both sides with such materials, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (chapter 39 or 40); or
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> (c) Plates, sheets or strip of cellular plastics or cellular rubber combined with felt or nonwovens, where the textile material is present merely for reinforcing purposes (chapter 39 or 40).

6) To prevail, Plaintiff needed to demonstrate (1) that the merchandise is a non-woven, either completely embedded in, or entirely coated or covered on both sides with plastic, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (Chapter 56, Note 3 (b)), or (2) that the non-woven textile component of the merchandise is present exclusively for reinforcing purposes (Chapter 56, Note 3(c)).

7) "[W]hat constitutes the common meaning of a tariff term is not a question of fact but a question of law." *Schott Optical Glass, Inc. v. United States*, 67 CCPA 32, 34, 612 F.2d 1283, 1285 (1979). To determine common meaning, in addition to relying upon its own understanding of the terms used, the Court may consult dictionaries, lexicons, the testimony of record and other reliable sources of information as an aid to its knowledge. *United States v. C.J. Tower and Sons*, 44 CCPA 1, 4 (1956). Accordingly, the Court sets forth the following interpretations of the pertinent tariff terms:

> (a) The definition of "embedded" is "set or fix[ed] firmly in a surrounding mass". *Webster's New World Dictionary*, Third College Edition 442–443 (1988). Adding the modifying "completely" which means "full[y], whole[ly], entire[ly]", *id.* at 285, the Court finds that the term "completely embedded" means that every fiber of the nonwoven must be entirely fixed firmly in the polyurethane.
>
> (b) "Coated" is defined as having "a layer of some substance, as paint, over a surface". *Webster's New World Dictionary*, Third College Edition 267 (1988). "Covered" means "to place something on, over, or in front of, so as to conceal, protect, or close." *Id.* at 320. Adding the modifier "entirely", which means "wholly, completely, totally, fully," *id.* at 453, the Court determines that the term "entirely coated or covered" means that the nonwoven must be completely coated or covered by a layer of polyurethane on either side of the fabric.
>
> (c) The definition of "reinforcing" is "something designed to provide additional strength (as in a weak area) * * *." Webster's *Third New International Dictionary* (unabridged) at 1915 (1993). The

term "merely" means "no more than: barely, only, simply, solely". *Id.* at 1413. The Court finds that the phrase "merely for reinforcing" means that the only function of the nonwoven is to strengthen the polyurethane.

8) As discussed in the "Findings of Fact", Plaintiff failed to demonstrate that the nonwoven component of the subject merchandise is "completely embedded" or "entirely coated or covered" by the polyurethane component. Further, Plaintiff failed to prove that the nonwoven component "is present merely for reinforcing purposes". Consequently, the subject merchandise is classifiable under HTSUS Heading 5603, Section XI, and excluded from Chapter 39.

9) The Court rejects Plaintiff's claim that the *Explanatory Notes to the Harmonized Commodity Description and Coding System* ("*Explanatory Notes*") mandate classification of the subject merchandise in Chapter 39. The Court may look to the *Explanatory Notes* for guidance in interpreting the HTSUS, but it is not bound by them. HR Conf. Rep. No. 576, 100th Cong., 2d Sess. at 549 (1988). The General Explanatory Note to Chapter 39 reads, in pertinent part:

> The following products are also covered by this Chapter:
> * * * * * * *
>
> (d) Plates, sheets and strip of cellular plastics combined with textile fabrics, felt or nonwovens, where the textile is present merely for reinforcing purposes.
>
> In this respect, unfigured, unbleached, bleached or uniformly dyed textile fabrics, when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. Figured, printed or more elaborately worked textiles (e.g., by raising) and special products, such as pile fabrics, tulle and lace and textile products of heading 58.11, are regarded as having a function beyond that of mere reinforcement.

Explanatory Notes at pp. 597–98. This might provide support for Plaintiff's position if it were not for the fact that the nonwoven component of the subject merchandise is not used "merely for reinforcing purposes".[4]

10) The Court need not perform an essential character analysis of the imitation leather pursuant to GRI 3(b) because classification was determined under GRI 1, as set out above.

11) If any of these Conclusions of Law shall more properly be Findings of Fact they shall be deemed to be so.

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[4] At trial, Mr. Holliday, Defendant's witness, testified that the nonwoven component at issue has special characteristics that contribute certain qualities to the subject merchandise. Thus, even if the other evidence was not persuasive, the nonwoven component could also be considered a "special product" as used in the *Explanatory Note*.

(Slip Op. 97–77)

FAG U.K. LTD., BARDEN CORP. (U.K.) LTD., BARDEN CORP., FAG BEARINGS CORP., NSK-RHP EUROPE LTD., AND RHP BEARINGS LTD., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 95–03–00335–S1

(Dated June 18, 1997)

JUDGMENT

TSOUCALAS, *Senior Judge:* On November 1, 1996, this Court remanded to the Department of Commerce, International Trade Administration ("Commerce"), several issues arising from the administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 Fed. Reg. 10,900 (Feb. 28, 1995), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Amendment to Final Results of Antidumping Duty Administrative Reviews and Recision of Partial Revocation of Antidumping Duty Order*, 60 Fed. Reg. 16,608 (Mar. 31, 1995). *See FAG U.K. Ltd. v. United States*, 20 CIT ____, 945 F. Supp. 260 (1996).

In particular, the Court ordered Commerce to: (1) utilize the approved tax-neutral methodology for adjusting for value-added taxes; (2) correct the clerical error of the conversion of insurance costs to dollars in cases in which the U.S. sales were already valued in dollars; (3) correct the clerical error in the application of the value-added tax twice to HEDGE value; and (4) correct the clerical error with respect to FAG/Barden U.S. sales.

On February 14, 1997, Commerce, in compliance with this Court's remand order, filed its *Final Results of Redetermination Pursuant to Court Remand* ("Remand Results"), with this Court. Commerce having complied with this Court's remand order, it is hereby

ORDERED that the Remand Results are affirmed, and all other issues having been previously decided, it is further

ORDERED that this case is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/60 6/13/97 Goldberg, J.	Data-products Corporation	90–12–00699, 91–06–00443, 91–08–00549, and 92–01–00003	3707.90.3000 8.5%	8473.30.50 Duty free	Agreed statement of facts	Los Angeles, CA Toner cartridges
C97/61 6/16/97 Tsoucalas, J.	Imaginings 3, Inc.	94–06–00365	4202.12.20858, 4202.92.45004 20%	4823.90.85 5.3%	Agreed statement of facts	Los Angeles, CA Bag expanders

Index

Customs Bulletin and Decisions
Vol. 31, No. 27, July 2, 1997

U.S. Customs Service

Treasury Decisions

	T.D. No.	Page
Customs approval of Socotec International Inspection USA Corporation as a commercial gauger	97–51	1
Drawback decisions, synopses of:		
Manufacturers:		
BP Chemical, Inc.	97–53–A	3
BP Exploration & Oil, Inc.	97–53–1	8
Canon Business Machines, Inc.	97–53–B	2
Ciba-Geigy Corp.	97–53–C	2
CONDEA Vista Co.	97–53–D	3
Devro-Teepak, Inc.	97–53–E	3
Donna Karan Co., The	97–53–F	3
Hoechst Celanese Chemical Group, Ltd.	97–53–G,H,I	3,3,5
Kerr-McGee Chemical Corp.	97–53–J	5
Knoll Pharmaceutical Co.	97–53–K	5
Light Sources, Inc.	97–53–L	5
Lonza Inc.	97–53–M	5
Lubrizol Corp., The	97–53–N	6
Lucent Technologies, Inc.	97–53–O	6
Markel Corp.	97–53–P	6
Merck & Co., Inc.	97–53–Q,R	6,6
Ohmeda Caribe Inc.	97–53–S	7
Rexam Industries Corp.	97–53–T	7
Sandoz Agro, Inc.	97–53–U	7
Southwire Co.	97–53–V	7
Texaco Refining and Marketing Inc.	97–53–2	9
ZENECA Inc.	97–53–W,X,Y,Z	8,8,8,8
Merchandise		
acetic acid	97–53–I	5
barium disilicate	97–53–L	5
barium magnesium aluminate	97–53–L	5
chlorodifluoromethane	97–53–S	7
copper, blister	97–53–V	7
copper anode & cathode	97–53–V	7
copper rod	97–53–V	7
ethylene	97–53–I	5
2-ethyl hexanol	97–53–H	4
fabric	97–53–F	4
hydroxysulfone	97–53–R	6
indinavir sulfate	97–53–Q	6
lubricating oil additive intermediate 0839.5	97–53–N	6
methanol	97–53–I	5
methoxyphenylacetic acid, p-	97–53–M	5
muccochloric acid	97–53–U	7
NP6000 solid mixture black toner powder	97–53–B	3
olefins	97–53–D	4
optical fiber	97–53–O	6
optical fiber preforms	97–53–O	6
paraffins	97–53–D	4
petroleum, crude & derivatives	97–53–1	8

	T.D. No.	Page
Drawback decisions, synopses of—*Continued:*		
Merchandise—*Continued:*		
polyester base, dry film resist	97–53–T	7
polyethylene, low density	97–53–T	7
polytetrafluoroethylene resin	97–53–P	6
pro-jet cyan 1 presscake (lixiviated)	97–53–X	8
pro-jet fast cyan 1 R.O. feed	97–53–W	8
pro-jet fast cyan 2 stage	97–53–Y	8
pro-jet fast cyan 2 stage presspaste	97–53–Y	8
pro-jet fast yellow 1G presspaste	97–53–Z	8
pro-jet fast yellow 1G stage	97–53–Z	8
propafenone hydrochloride powder	97–53–K	5
propylene	97–53–G	4
rutile, synthetic	97–53–J	5
sausage casings, semi-finished	97–53–E	4
silica Sol	97–53–A	3
steel wire	97–53–V	7
strontium aluminate	97–53–L	5
strontium pyrophosphate	97–53–L	5
strontium tetraborate	97–53–L	5
strontium tinanate	97–53–B	3
tertiary butylamine	97–53–C	3
trifluoroethanol	97–53–S	7
trifluoromethylaniline	97–53–U	7
tubes	97–53–O	6
verapamil hydrochloride powder	97–53–K	5
Revocation of gauger approval and revocation of laboratory accreditations of Laboratory Service Inc.'s facilities located in Norco, Louisiana, and Bayonne NewJersey	97–52	2

General Notices

	Page
Application for recordation of trade name:	
Coincident sequencing	11
Winfing	12

CUSTOMS RULINGS LETTERS

	Page
Tariff classification:	
Proposed modification:	
Lighted artificial pine garland	23
Tents	17
Proposed revocation:	
Toy hats	28
Revocation:	
Stackable CD racks	13

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Bradford Industries, Inc. *v.* United States	97–76	82
FAG U.K. Ltd. *v.* United States	97–77	86
Mark D. Myers d/b/a/ VMC USA *v.* United States	97–75	71
NSK Ltd. *v.* United States	97–74	35

Abstracted Decisions

	Decision No.	Page
Classification	C97/60–C97/61	87

Federal Recycling Program
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